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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-746

ATLAS ROOFING COMPANY, INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Atlas Roofing Company, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 8, 1975.

OPINION BELOW

The opinion of the Court of Appeals, which has not yet been reported, appears as Appendix A hereto.[1] The order and opinion of the Occupational Safety and Health Review Commission, reported at 3 OSAHRC 19 (1973) is reprinted as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1975, and this Petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the procedures set up by the Occupational Safety and Health Act of 1970 for administrative

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[1] Simultaneously herewith, a Petition for Certiorari is being filed in the case of *Frank Irey, Jr., Inc. v. O.S.H.R.C.*, seeking review of a Third Circuit en banc decision rejecting the same constitutional claims. *See Frank Irey, Jr., Inc. v. O.S.H.R.C., et al.*, ____ F.2d ____ (Dkt. No. 73-1765, July 24, 1975), Pet. for Cert. No. ____ [hereinafter cited as "Irey Petition"].

Also being filed herewith is a Petition for Certiorari in the case of *Dan J. Sheehan v. O.S.H.R.C.*, Pet. for Cert. No. ____, [hereinafter "Sheehan Petition"] seeking review of the Fifth Circuit's holding rejecting the contention that the OSHA enforcement scheme unconstitutionally deters penalized employers from seeking administrative or judicial review of penalties. *See Dan J. Sheehan v. O.S.H.R.C.*, ____ F.2d ____ (5th Cir., No. 74-2764, October 8, 1975).

enforcement of the Act's civil penalties and administrative definition of the Act's proscriptions violate Article III and the Fifth, and Sixth Amendments to the Constitution because the "civil penalties" and administrative enforcement mechanism are "penal" in nature and effect but omit the constitutional protections required in penal proceedings, including trial by jury.

2. Assuming *arguendo* that such civil penalties and enforcement procedures are civil in nature and effect, whether such procedures deny the defendant employer his right to jury trial guaranteed by the Seventh Amendment to the Constitution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Occupational Safety and Health Act of 1970, 29 U.S.C. 651, *et seq.* (1970), and the relevant provisions of the United States Constitution appear as Appendices to the *Irey* Petition.

STATEMENT OF THE CASE

Petitioner is a roofing subcontractor whose construction site was inspected after a report to the Occupational Safety and Health Commission that one of Petitioner's employees had died on the site. On June 15, 1972, the Secretary issued a citation for one "serious" violation. The proposed "civil penalty" assessed by the OSHA area director for the violation

was $600.00, and a direction that the condition be abated immediately.[2]

In order to prevent the citations from becoming final and unreviewable orders under Section 10 of the Act, Petitioner served a notice of contest within the time period allowed. The Secretary thereafter filed a Complaint with the Occupational Safety and Health Review Commission, and Petitioner filed an Answer denying any violation of the Act. Petitioner moved on August 30, 1972, before the Commission for a jury trial and for "procedural due process", and also moved to dismiss on the grounds that OSHA and its enforcement procedures are unconstitutional. These motions were denied "for lack of jurisdiction."

A hearing was held on the Secretary's Complaint on November 2, 1972, before a hearing examiner of the Occupational Safety and Health Review Commission. The administrative hearing examiner rendered a decision "affirming" the violation and the penalty as well as denying the motion to dismiss. The hearing examiner's decision subsequently became the final order of the Commission under §12(j) of the Act, 29 U.S.C.

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[2]The Act provides that an employer who is cited for a "serious violation" shall be assessed a civil penalty of up to $1,000.00, and an employer whose violation is not "serious" may be assessed a similar civil penalty. 29 U.S.C. §666(b),(c). It defines "serious violation" as one presenting a substantial probability of death or serious physical harm. *Id.* §666(k). A civil penalty of up to $10,000.00 is authorized for willful or repeated violations. *Id.* §666(a). And a criminal sanction of up to $10,000.00 fine and six months' imprisonment is authorized for any willful violation which causes the death of an employee. *Id.* §666(e).

§661(i), because no member of the Commission directed review of the decision within 30 days of its filing. (App. B).

Petitioner Atlas, a resident of the territorial jurisdiction of the Fifth Circuit, filed a timely Petition for Review of the Review Commission's final order on May 30, 1973, pursuant to Section 11(a) of the Act, 29 U.S.C. §660(a).

The Court of Appeals, in an opinion by Chief Judge Brown filed on September 8, 1975, held that the enforcement procedures of the Act did not contravene Article III or the Fifth, Sixth, or Seventh Amendments to the Constitution. (App. A.) The Court "recogniz[ed] the importance as well as the novelty in some cases of Atlas' arguments", (App. A, p. 3), and also recognized that "the existence of both civil and criminal alternatives [in the enforcement mechanism of the statute] does not alone suffice to validate the statute" and that "the absence of any mention of punishment in the legislative history does not immunize the statute from further review." (App. A, p. 12). Nonetheless, the court held that under the tests laid down by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), "taken as a whole, we think that Atlas has failed to demonstrate that Congress meant the statute to reprimand rather than regulate." (App. A, p. 25). The Court also rejected Atlas' contention that even if the penalties are civil in nature, "the Seventh Amendment requires that Congress provide a system of enforcement that gives employers the opportunity to put their case before a jury in a de novo proceeding in the District Court." (App. A, p. 25).

REASONS FOR GRANTING THE WRIT

1. WHETHER JURY TRIALS ARE CONSTITUTIONALLY REQUIRED IN "CIVIL PENALTY" PROCEEDINGS UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT IS A QUESTION OF SUBSTANTIAL NATIONAL IMPORTANCE WHICH IS BEING CONSIDERED BY NUMEROUS COURTS

Petitioner Atlas has exhausted its administrative remedies and now asks this Court to review the merits of its constitutional objections concerning a statute which is probably the most pervasive federal regulatory statute existent today, which statute has not given rise to any previous judgment or opinion of this Court.[3]

In the Court below, the Fifth Circuit recognized "the importance as well as the novelty in some cases of petitioner Atlas' arguments" (App. A, p. 3) and noted regarding the Sixth Amendment jury argument (App. A, p. 6, footnote omitted):

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[3]In the cases of *Lance Roofing Company, Inc., et al. v. Hodgson*, 343 F.Supp. 685 (N.D. Ga.) *aff'd*, 409 U.S. 1070 (1972), and in a case brought simultaneously by Frank Irey, Jr., Inc., petitioner in the companion case (see note 1, *supra*) *Frank Irey, Jr., Inc. v. Hodgson*, 354 F.Supp. 20 (S.D. W. Va.) *aff'd*, 409 U.S. 1070 (1972), the Occupational Safety and Health Act of 1970 was challenged in an action for declaratory judgment and injunctive relief. However, since the *Lance* and *Irey* plaintiffs had filed a Notice of Contest, thus invoking an administrative adjudicative process, the district court held in each case that the plaintiffs must exhaust their administrative remedies by presenting their constitutional objections in the administrative process and seeking judicial review of that process. This Court affirmed, with Mr. Justice Stewart indicating he would have noted probable jurisdiction. 409 U.S. 1070 (1972).

> This issue has importance even beyond the case at hand because the streamlined enforcement procedure embodied in OSHA, although presently prescribed in only a few instances, has been recommended as a blueprint for a major revision of the enforcement systems of all federal agencies.

The Court went on to state that "the enormous potential effects of a proliferation of OSHA-like enforcement systems are factors that persuade us that we should carefully scrutinize the statute against the case-law experience." App. A, p. 12).[4]

In drafting OSHA, Congress devised a most unusual administrative enforcement procedure. Unlike civil penalty provisions common in other agency statutes, the OSHA procedure gave the agency the full power to adjudicate a violation and to assess a punitive monetary penalty. The adjudication and penalty were made subject only to very limited judicial review.

Faced with the problem of regulating occupational safety, Congress could have created an independent agency with power and procedures similar to those which have been assigned to federal agencies regulating commercial practices, labor relations and fair employment opportunities. It could, in other words, have established an agency – on the model of the Federal Trade Commission, the National Labor Relations Board or the Equal Employment Opportunity Commission –

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[4]The recommendation referred to by the Fifth Circuit (App. A, p. 6, n.11) is set forth in Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1972), pp. 900-901. *See Irey* Petition p.8, note 5.

which would have had the power, subject to judicial review, to conduct hearings and issue orders directing specific compliance with legislative or regulatory standards. In addition, to reinforce that authority where situations required, Congress could have given the agency authority to seek immediate judicial assistance to correct dangerous conditions which present emergency problems (as it has, in fact, done in Section 13 of OSHA).

Instead, in what the three-judge district court in *Lance Roofing Company v. Hodgson*, 343 F. Supp. 685 (N.D. Ga., 1972), *aff'd*, 409 U.S. 1070 (1972), characterized as a "seemingly unique piece of legislation," Congress selected novel procedures and granted plenary powers which raise grave constitutional questions. It vested in the Executive Branch the authority to find violations and levy fines (termed "civil penalties") for past infractions and denied to employers the right to de novo review in district courts or even the right to obtain even limited judicial review of such Executive decisions until they had been considered by a hearing examiner and a review commission. In addition, the statutory scheme chosen by Congress discourages efforts to seek any hearing on the Executive Branch decision by holding over employers' heads the prospect of substantial cumulative penalties for noncompliance with the Executive Branch's order in all cases where the reviewing agency does not affirmatively find employer good faith in invoking its authority. And it further deters such review by permitting the agency to increase the "proposed penalties" even if it finds that review of

the Executive Branch decision was undertaken in good faith.[5]

The most obvious consequence of requiring citizens to comply with these administrative enforcement procedures under OSHA is to subject them to extended and expensive contests of penal fines without affording the traditional requirements of procedural due process guaranteed by the Fifth Amendment, the right to trial by jury, or even the right of jury trial as guaranteed in civil cases under the Seventh Amendment. See *Irey* Petition. If the Secretary's inspectors may use this extended procedure to compel those who take issue with their self-executing citations and penalties to surrender cheaply rather than fight dearly, then the ends of justice will not be served.

If these procedures are constitutionally permissible, it would follow that the Federal Trade Commission – given legislative authority – could impose a substantial self-executing fine for one or several past violations of the Robinson-Patman Act and the National Labor Relations Board could do the same for an unlawful secondary boycott or an improper discharge of an union organizer, as could the Equal Employment Opportunity Commission for unlawful employment practices. And the same agencies might, by parity of reasoning, assess daily penalties (if they are not satisfied of "good faith") for failure to change a practice which is allegedly unlawful during the period that the challenge to that practice is being considered and determined.

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[5] The "chilling effect" features of the Act are the subject of the *Sheehan* Petition.

We demonstrate in the following sections of this petition and in the companion *Irey* and *Sheehan* Petitions that the decisions below present important questions of constitutional law respecting jury rights and procedural due process not previously decided by this Court. These issues also pose vital concerns going to the allocation of power between the judicial and legislative branches of government under Article III of the Constitution. Finally, the questions are presented in a form incontestably ripe for resolution by this Court with no "factual" disputes likely to obscure the constitutional analysis necessary for their disposition.

2. THE "CIVIL PENALTIES" ASSESSED AGAINST PETITIONER ARE PENAL IN NATURE AND THUS CANNOT VALIDLY BE IMPOSED ABSENT THE CONSTITUTIONAL PROTECTIONS OF THE FIFTH AND SIXTH AMENDMENTS

Section 17 of OSHA, 29 U.S.C. §666, provides both civil and criminal penalties for violations of the Act and the regulations promulgated by the Secretary of Labor. The Act in turn requires the employer to furnish a place of employment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees", 29 U.S.C. §654(a)(1), and in compliance with the regulations promulgated by the Secretary. 29 U.S.C. §654(a)(2). If the employer willfully violates this requirement and a death results from the violation, the employer can be

criminally prosecuted.[6] If convicted, he can be sentenced to up to 6 months in jail or a $10,000.00 fine, or both. 29 U.S.C. §666(e). The proof required in this criminal action is very similar to that required in an ordinary common law involuntary manslaughter case: the government must show that death resulted from conduct falling below prescribed standards of conduct. *See* PERKINS, CRIMINAL LAW 70-73 (2d ed. 1969).

The practical identity between "civil" and criminal prosecution in terms of impact on a corporate defendant is illustrated by the proceeding in this case. The citation here is for a "serious" violation which resulted in the death of one of the employees of Atlas. During the administrative hearing, the government offered testimony intended to establish that one of Atlas' employees died because of the employer's unlawful course of action in permitting a condition to exist at the construction site and that Atlas knew of the conditions and knew of the serious and homicidal risks entailed by the alleged violation.[7]

The Third Circuit panel in the *Frank Irey* companion case recognized that "there is force and logic to [petitioner's] arguments," and insisted that "we do not dismiss them lightly." The panel also stated that "[i]n the case *sub judice*, candor compels us to concede that the punitive aspects of the OSHA penalties, particularly

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[6] The statute provides a parallel civil penalty of up to $10,000 for a charge of "willful" violation. 29 U.S.C. §666(a). The Fifth Circuit in this case expressly reserved the question whether a "willful" violation could be the subject of a non-jury "civil enforcement" proceeding. (App. A, p. 23). That issue is squarely presented on the facts of *Irey*. See *Irey* Petition, pp. 4-5, 17-19.

[7] Transcript, pp. 7-38.

for a 'wilful' violation, are far more apparent than any 'remedial' features" (Slip opinion, p. 7). But even after conceding the punitive aspects of OSHA, the panel majority failed to apply the mandate in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), that regardless of its label, if a statute is penal in nature, then citizens must be afforded Fifth and Sixth Amendment procedural safeguards. The majority misconstrued the mandate of *Kennedy v. Mendoza-Martinez* when it stated:

> "In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the Court considered the question of the criteria to be applied in determining whether sanctions are penal or regulatory in nature. The Court said that in the absence of an expression of congressional intent such factors as scienter, punishment, and excessiveness, inter alia, may be weighed. We do not perform any such analysis here because the congressional intent is clear." (Slip opinion, p. 9).

In *Kennedy v. Mendoza-Martinez, supra*, this Court outlined in some detail the factors that should be considered in determining whether a particular sanction is civil or criminal. 372 U.S. at 168-170. In light of these factors and the factors highlighted in earlier cases, the civil penalties provided under OSHA appear even more clearly criminal in nature.[8]

[8] In the instant case – unlike the Third Circuit in the *Irey* case, see *Irey* Petition, pp. 20-21 – the Fifth Circuit purportedly declined to accord Congress' label a conclusive effect and instead performed the *Mendoza-Martinez* analysis the Third Circuit avoided. *See* App. A, pp. 12-25. But it is by no means clear that the Fifth Circuit did not in fact end up simply according the congressional choice of labels conclusive effect for purposes of judicial review just as in the *Irey* case.

First, the potential penalty is substantial, even though the actual penalty in the case at bar was only $600.00. As Chief Judge Brown noted in the opinion below, "even though monetary penalties do not fit within the conventional definition of disability . . . they do inflict a pocket-book deterence or restraint on the individual." (App. A, p. 13).

Second, the civil penalty here is clearly punitive rather than remedial. Unlike backpay awards in NLRB proceedings or civil penalties in tax cases, the penalty is not designed to compensate the party suffering from the misconduct. It does not provide a remedy for an injured private party or for a specific injury to the government, but rather a punishment for a more general public offense. The OSHA penalty is naked vengeance against a citizen which is devoid of any compensatory

Thus, at a critical point in its application of the *Kennedy v. Mendoza-Martinez* analysis to OSHA – *i.e.*, the examination of the "alternative purpose other than punishment" factor, *see* p.16 *infra* – the Court simply announces "this factor is one which must be carefully restricted" (App. A, pp. 23-24) and, with a citation to the Third Circuit's *Irey* opinion (App. A, p.24 n.50), asks rhetorically what Judges know about the best method of protecting life in industry.

But any deference necessary to congressional expertise in choosing methods to achieve legislative purposes is built into the "rational alternative purpose" factor described in *Kennedy v. Mendoza-Martinez, supra*, 372 U.S. at 169. The question still remains to be answered (and, we submit, is nowhere answered in the Fifth Circuit's opinion): what alternative purpose other than achievement of the legislative goal through punitive measures is rationally ascribable to a system of penalties geared to the identical factors considered by a sentencing judge in a criminal case? To decline to answer that question – on the theory that judges don't understand industry safety needs – is simply to abdicate the function of judicial review of congressional purpose.

purpose. *See Huntington v. Attrill*, 146 U.S. 657, 667 (1892); *Morissette v. United States*, 342 U.S. 246, 256 (1952); 3 BLACKSTONE COMMENTARIES 2 (Lewis ed. 1898).

In addition, the statute specifically directs that in determining the size of the penalty, the Commission should "give due consideration to . . . the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. §666(1). These considerations plainly have nothing to do with compensation of any injured party – they relate directly to the evidence of congressional intent to "let the punishment fit the crime."[9]

The Fifth Circuit opinion confronts directly the essentially "deterent" and "retributive" nature of the OSHA penalty, and – relying essentially on the fact that civil penalties exist in a host of other regulatory statutes (App. A, pp. 15-22 n.43) – reasons that "deterence" may be a legitimate goal of a civil remedial statute.

But in cases such as *Helvering v. Mtichell*, 303 U.S. 391 (1938) the Court specifically relied on the fact that the civil tax penalty had remedial purposes additional to deterence. 303 U.S. at 399-401 and n.3. The penalty – actually an addition to tax due – was provided

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[9] It is clear that in practice as well as in theory, penalties are scaled according to the Secretary's impression of the employer's relative culpability. The Secretary's OSHA Manual prescribes adjustments "by as much as 40% on the basis of degree of the employer's wrongdoing." 77 BNA OSH Rep. 3701-04.

(emphasis added) "primarily as a safeguard for the protection of the revenue *and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud.*" *Id.* at 401. This distinction had been the basis on which the Court had declared purported "taxes" to be criminal penalties instead. *See, e.g., Helwig v. United States*, 188 U.S. 605 (1903); *Lipke v. Lederer*, 259 U.S. 557 (1922); *United States v. La Franca*, 282 U.S. 568 (1931). It is another step in the analysis entirely to assert that a "penalty" which is in reality addressed *exclusively* to retributive and deterent purposes may thereby be labeled "remedial" or "penal" at the option of Congress for purposes of constitutional classification.

Yet that is precisely the step which the Fifth Circuit takes in this case. Thus, in discussing the question "whether the sanction appears excessive when compared with the alternative purpose assigned" (App. A, p. 24), the Court states:

> While this certainly is a subjective factor, it is one that Atlas' arguments fail to hurdle as well. The remedial functions obviously served by the civil penalties of OSHA may in many circumstances justify imposing the maximum penalties available under the statute. These penalties will often be reduced by the mitigating factors that the imposing agency must consider in assessing the penalty. For example, Atlas' own $600 penalty represents a reduction of $400 after the Secretary had considered the gravity of the offense, the size of the business, the good faith of the employer and the history of previous violations. We cannot say that the penalty is excessive if in the considered judgment of the Administrative Agency it results in improved industrial practices that help to prevent future deaths from falls of employees of Atlas.

What is being described here as "remedial" is a "sentencing" function absolutely identical to that which a federal district judge would perform in deciding the size of a Sherman Act fine for a convicted price fixer. Nowhere does the Fifth Circuit seriously suggest any "remedial" purpose is being pursued in OSHA fines *alternative or in addition to* the purpose of punishing wrongdoers in the hope that they and others like them will obey the law in the future.

Third, the civil penalty is triggered in the case of both willful and serious violations, only on a finding of scienter. As is the case in many criminal actions, the harsher penalty can be imposed only upon a finding of willfulness, while the lesser penalty – for serious violations – requires a showing that the employer knew about, or could, with reasonable diligence, have known about the violations, 29 U.S.C. §666(j).

Fourth, no alternative purpose other than punishment appears evident on the fact of the statute. At the very least, it is clear that the traditional criminal aims of punishment and deterence are the essential purposes of the civil penalty scheme. The seriousness of the violation – and the magnitude of the penalty – vary with the defendant's state of mind and ability to pay. If there is any purpose in such a scheme other than punishment, it is certainly dwarfed to insignificance by the punitive element.

Finally, there is evidence in the legislative history that Congress specifically intended to use the civil penalty as a device to punish criminal conduct. In explaining why civil penalties were used instead of criminal sanctions, Senator Dominick commented:

> . . . We did it this way because I think most of us know how difficult it is to get an enforceable criminal penalty in these type of cases. Over and over again, the burden of proof under a criminal-type allegation is so strong that you simply cannot get there, so you might as well have a civil penalty instead of the criminal penalty and get the employer by the pocketbook if you cannot get him anywhere else. 116 CONG. REC. 37338 (1970).

It is ironic that if Congress had called the civil penalty criminal and had provided for conviction on proof of a preponderance of the evidence and denial of a jury trial, the Fifth Circuit would have struck down the statute in an instant. Petitioner urges this Court to make clear that Congress cannot do indirectly what it so plainly could not do directly.[10]

Suppose Congress in 1968 had chosen to establish an administrative scheme providing a $10,000 penalty for willful interference with a person's civil rights by knowingly creating risks of death or serious injury instead of new criminal penalties. Would the law have been constitutional? Such a statute might have much to commend it as a matter of social policy; local juries could be avoided, speedier justice would be ensured, and great amounts of money would be saved by

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[10] *See also* Hay, *OSHA Penalties: Some Constitutional Considerations*, 10 IDAHO L. REV. 223 (1974), where the author performs the *Kennedy v. Mendoza-Martinez* analysis and reaches an unequivocal conclusion that the OSHA civil penalty scheme is penal in nature and the constitutional safeguards of the Fifth and Sixth Amendments should be afforded.

avoiding criminal procedures. But criminal protections cannot so readily be discarded. Nor, in the context of this case and employee safety, is it clear that Congress may make such a "policy judgment", *i.e.*, rather than define a new federal "crime" for primary behavior typically punishable as "criminal" and viewed by the community as such, punish the same conduct by a route it thinks speedier, cheaper and less likely to result in "irrational" verdicts.

> Those who wrote our Constitution. . .intended to safeguard the people of this courtry from punishment without trial by duly constituted courts [citation omitted]. And even the courts to which this important function was entrusted, were commanded to stay their hands until and unless certain tested safeguards were observed. An accused in court must be tried by an impartial jury, has a right to be represented by counsel, [and] must be clearly informed of the charge against him .... *United States v. Lovett*, 328 U.S. 303, 317 (1946).

3. THE COURT BELOW MISREAD AND MISAPPLIED THIS COURT'S SEVENTH AMENDMENT DECISIONS IN DENYING PETITIONER A JURY TRIAL

This issue is analyzed in the companion *Irey* Petition and we respectfully refer the court to the discussion set forth therein, at pp. 10-17.

The Fifth Circuit's opinion adds only a "single red sou" argument to the Third Circuit's analysis (App. A, pp. 25-26):

> That the civil sanction under attack is in the form of a dollar penalty is not a sufficient distinction to deny the power of Congress to prescribe an administrative, as distinguished from a judicial mechanism. To so hold would produce the absurd spectacle of Congress – having full power to prescribe an administrative structure with sanctions of denial or revocation of a life-or-death license (see the large number of such statutes at note 43, *supra*) – being denied the power to prescribe a money fine of a single dollar or for that matter a single red sou.

One might just as well argue that the Seventh Amendment is an "absurd spectacle". However "absurd" it might seem to its detractors, that Amendment does prohibit Congress from allowing a federal district judge to compel a citizen to submit for his sole determination factual disputes involving twenty dollars or more, while allowing Congress to permit the same judge to compel Standard Oil Company to submit to a federal judicial determination of the question whether or not that huge company may even continue to exist. The point is that whatever legitimate control Congress may have under Article III and the Seventh Amendment over the allocation of functions between federal judges, juries, and administrative law judges must rest on the type of sanction or consequence involved, and not on a comparison of severity of possible consequences in individual cases plucked from different categories or types of sanctions.

CONCLUSION

The issues posed in this case and the companion case of *Frank Irey, Jr., Inc. v. O.S.H.R.C., et al.*, are as fundamental as they are controversial;[11] they are also an outgrowth of decisions of this Court such as *N.L.R.B. v. Jones & Laughlin*, 301 U.S. 1 (1937), and *Helvering v. Mitchell, supra*, decided in the context of very different statutory schemes, but which the lower courts here, with considerable doubt, felt bound to follow in the context of OSHA.

The adjudication of these issues will either set the high-water mark beyond which the enforcement powers of the Executive Branch of government cannot go without providing the constitutional guarantees of jury trial and due process, or it will act as the breach in the dike as the pattern of future legislation, setting off a virtual tidal wave of similar "civil penalty" enforcement procedures. As James Madison once counselled, in reference to the necessity of a separation of the departments of government,

> Temporary deviations from fundamental principles are always more or less dangerous. When the first pretext fails, those who become interested in prolonging the evil will rarely be at a loss for

[11] Additional academic commentaries on these issues include McClintock & Bohrnsen, *Constitutional Challenges*, 9 GONZAGA L. REV. 361 (1973); Note, *OSHA: Employer Beware*, 10 HOUSTON L. REV. 426 (1973); Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974); Hay, *OSHA Penalties – Some Constitutional Considerations*, 10 IDAHO L. REV. 223 (1974).

> other pretexts. The first precedent, too, familiarises the people to the irregularity, lessens their veneration for those fundamental principles, and makes them a more easy prey to ambition and self-interest. Hence it is that abuses of every kind, when once established, have been so often found to perpetuate themselves. Letter from James Madison to John Brown, dated August 23, 1785, 2 WORKS OF MADISON 183 (1900).

We submit that the issues are uniquely ripe for this Court's resolution and, before the unusual model of OSHA becomes the rule for the future, an authoritative determination by this Court of those issues is called for.

Respectfully submitted,

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APPENDIX A

ATLAS ROOFING COMPANY, INC., Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, UNITED STATES DEPARTMENT OF LABOR, Respondent.

No. 73-2249.

United States Court of Appeals, Fifth Circuit.

September 8, 1975.

Roofing company filed petition for review of an order of Occupational Safety and Health Review Commission which affirmed a $600 penalty assessment by the Secretary of Labor for a violation of the Occupational Safety and Health Act. The Court of Appeals, Brown, Chief Judge, held that the Act is not a criminal or penal statute and is not defective because it does not provide constitutional protections available in criminal cases; that the Act is not defective because it does not provide for jury trials; that the provision of the Act that allows the Secretary's citation and penalty to become the final order of the Commission in absence of a challenge by the employer does not violate due process; and that the Administrative Law Judge's finding that the roofing company should have known of the presence of the violation was supported by evidence.

Affirmed.

1. Criminal Law ⇐13(1)

Relevant to inquiry of whether a statute is penal or regulatory in character are questions of whether sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote traditional aims of punishment, whether behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

2. Labor Relations ⇐1056

The civil penalties provided for violation of the Occupational Safety and Health Act are not penal in nature and are not invalid because the Act does not provide for the constitutional protections granted by the Constitution in criminal prosecutions. U.S.C.A.Const. art. 3, § 1 et seq.; Amends. 5, 6; Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

3. Constitutional Law ⇐50

There is nothing improper in the election by Congress to impose its own sanctions, civil, criminal or both, without regard to its treatment by other components of our federalism.

4. Labor Relations ⇐1056

Penalty of $600 imposed by Secretary of Labor under the Occupational Safety and Health Act for serious violation of roofing safety regulations which resulted in death of an employee was not excessive where, in the considered judgment of the agency, it would result in improved industrial practices that might help to prevent future deaths from falls of employees. Occupational Safety and Health Act of 1970, §§ 10, 17, 29 U.S.C.A. §§ 659, 666.

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5. Labor Relations ⇐7

The focus of the Occupational Safety and Health Act, the control of jobsite safety practices and health conditions, has a demonstrable and legitimate government concern and the fact that the civil enforcement sanctions are inherently disabilities does not alter the nature of the congressional purpose. Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

6. Jury ⇐31(2)

The Occupational Safety and Health Act is not defective because it does not provide a system of enforcement that gives employers the opportunity to put their case before a jury in a de novo proceeding in the district court. U.S.C.A.Const. Amend. 7; Occupational Safety and Health Act of 1970, §§ 10, 17, 29 U.S.C.A. §§ 659, 666.

7. Constitutional Law ⇐275(2)

Employers are not denied due process because Occupational Safety and Health Act vs citation and penalty issued by the Secretary of Labor to become the final order of the Occupational Safety and Health Review Commission in the absence of a challenge by the em- U.S.C.A.Const. Amend. 5; Occupational Safety and Health Act of 1970, § 10(b), 29 U.S.C.A. § 659(b).

8. Constitutional Law ⇐42.1(5)

Where employer was not penalized by provisions of the Occupational Safety and Health Act which granted the agency authority to increase penalty under certain conditions or to cumulate penalties under certain conditions, employer did not have standing to challenge those aspects of the Act. Occupational Safety and Health Act of 1970, § 17(d), 29 U.S.C.A. § 666(d).

9. Labor Relations ⇐7

Roofing company's use of two bundles of insulation material of the same type then being laid over the roof to cover hole in roof did not satisfy requirement of Occupational Safety and Health Regulation that roof opening covers be so installed as to prevent accidental displacement. Occupational Safety and Health Act of 1970, § 17(b, j, *l*), 29 U.S.C.A. § 666(d, i, k).

10. Labor Relations ⇐27

Substantial evidence supported finding of Administrative Law Judge for the Occupational Safety and Health Review Commission that there was a "serious violation" of regulation governing roof hole coverings and that roofing company should have known of the presence of the violation of the regulation which resulted in the death of an employee. Occupational Safety and Health Act of 1970, § 17(b, *l*), 29 U.S.C.A. § 666(b, k).

Petition for review of an order of the Occupational Safety and Health Review Commission (Georgia case).

Before BROWN, Chief Judge, and GODBOLD and SIMPSON, Circuit Judges.

JOHN R. BROWN, Chief Judge:

Atlas Roofing Company petitions this Court to review an order of the Occupational Safety and Health Review Commission (OSHRECOM)[1] affirming a $600.00 penalty assessed by the Secretary of Labor under the Occupational Safety and Health Act of 1970 (OSHA).[2] Specifically Atlas was cited for violation of 29 C.F.R. 1926.500(f)(5)(ii) for failing to adequately cover roof openings that resulted in the death of one of its employees. Petitioner challenges the order not only on the issue of substantive compliance with the regulation, but also on the grounds that the basic structure of OSHA is constitutionally defective because (1) the civil penalties under OSHA are really penal in nature and call for the constitutional protections of the Sixth Amendment and Article III (2) even if found to be a civil penalty, OSHA violates the Seventh Amendment because of the absence of a jury trial, and (3) this is a denial of the Fifth Amendment right to a "prejudgment" due process hearing, since under OSHRECOM orders are self-executing unless the employer affirmatively seeks review. While we recognize the importance as well as the novelty in some cases of Atlas' arguments, we disagree with these contentions and affirm.

I. In The Beginning

At 9 a. m. on June 6, 1972 Johnny Boseman, a temporary employee of Atlas Roofing Company, was fatally injured when he fell through a 3′ x 3′ ventilation bay set in the roof of an unfinished warehouse to the concrete floor 30 feet below. Boseman's death initiated an inspection by the Department of Labor and as a result, Atlas, his employer and the subcontractor for the project, was cited for a "serious" violation[3] of OSHA for failing to maintain an adequate cover or railing around the exposed roof bay.[4] Atlas was directed to correct the violation immediately and pay a $600.00 penalty. In response, Atlas chose to contest the citation and proposed penalty by way of the statutory review procedure.[5]

1. As this is obviously going to be a fruitful source of Court of Appeals litigation, acronyms will be a handy tool. But they are better if they are readily pronounceable. So we have added to the initials the suffix ECOM to read OSHRECOM.

2. 29 U.S.C.A. § 651 et seq.

3. **§ 659. Enforcement procedures—Notification of employer of proposed assessment of penalty subsequent to issuance of citation; time for notification of Secretary by employer of contest by employer of citation or proposed assessment; citation and proposed assessment as final order upon failure of employer to notify of contest and failure of employees to file notice**

(a) If, after an inspection or investigation, the Secretary issues a citation under section 658(a) of this title, he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 666 of this title and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) of this section within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

§ 666. Civil and criminal penalties

(b) Any employer who has received a citation for a serious violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pur-

4, 5. Notes 4 & 5 on page 7648.

In the hearing before the Review Commission Administrative Law Judge (ALJ), Atlas denied that it had violated the regulations and raised as additional defenses the contentions that the enforcement procedures of OSHA were unconstitutional.[6]

Limiting his decision to Atlas' factual arguments only, the ALJ concluded that the applicable regulation required employers to provide guardrails around roof openings and, absent those, a cover that was "so installed as to prevent accidental displacement."[7] In view of this requirement, the ALJ concluded that Atlas had failed to show that the insulation material—of the same nature that was being used for the roof covering—met the requirements of the applicable standard. The proposed $600.00 penalty was adjudged to be an appropriate and reasonable one.

Subsequently, Atlas filed a petition to seek discretionary review by OSHRECOM itself.[8] Because no member of the Commission requested that the decision of the ALJ be reviewed, this decision became the final order of the Commission 30 days later on May 7, 1973. Thereafter Atlas petitioned for review of this order in the Court of Appeals and moved for and was granted a stay of the penalty by the Commission.[9]

suant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, shall be assessed a civil penalty of up to $1,000 for each such violation.

4. The safety standard said to be violated was 29 C.F.R. 1926.500 that read:

(b) *Guarding of floor openings and floor holes.* (1) Floor openings shall be guarded by a standard railing and toe boards or cover, as specified in paragraph (f) of this section. In general, the railing shall be provided on all exposed sides, except at entrances to stairways.

and (F)

(5) Floor opening covers shall be of any material that meets the following strength requirements:

(i) Cr[illegible]its, trenches, and manhole covers and th[illegible]upports, when located in roadways, [illegible]vehicular aisles, shall be designed to carry a truck rear-axle load of at least 2 times the maximum intended load;

(ii) The floor opening cover shall be capable of supporting the maximum intended load and so installed as to prevent accidental displacement.

5. 29 U.S.C.A. § 659(a), *supra*

6. Prior to the administrative hearing, petitioner filed a jury trial demand and requested that it be accorded other rights incidental to criminal proceedings. At the same time Atlas moved to dismiss the complaint on the grounds that the enforcement procedures of the Act were unconstitutional. The ALJ, interpreting petitioner's motion as a challenge on Fifth, Sixth, and Seventh Amendment grounds, denied these motions for an assumed lack of power in OSHRECOM to pass on constitutional issues.

7. 29 C.F.R. 1926.500(f)(5)(ii).

8. 29 U.S.C.A. § 661(i).

Hearing examiner; determination; report as final order of Commission

(i) A hearing examiner appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such hearing examiner by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the hearing examiner shall become the final order of the Commission within thirty days after such report by the hearing examiner, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

9. 29 U.S.C.A. § 660(a).

§ 660. Judicial review—Filing of petition by person adversely affected or aggrieved; orders subject to review; jurisdiction; venue; procedure; conclusiveness of record and findings of Commission; appropriate relief; finality of judgment

(a) Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 659 of this title may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying or setting aside in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. The commencement of proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the Commission. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of Title 28. Petitions filed under this subsection shall be heard expeditiously.

29 C.F.R. 2200.92, as revised, 37 F.R. 20237, 20242.

Stay of final order

(a) Any party aggrieved by a final order of the Commission may, while the matter is within the jurisdiction of the Commission, file a motion for a stay.

(b) Such motion shall set forth the reasons a stay is sought and the length of the stay requested.

(c) The Commission may order such stay for the period requested or for such longer or shorter period as it deems appropriate.

II. The Constitutional Challenges

When Is A Penalty A Fine?

One of petitioner's strongest points is that OSHA crosses that elusive line between criminal fines—that of necessity require the Sixth Amendment protections—and civil regulatory sanctions—that are left to fall back upon the more amorphous protections of due process. These distinctions are elemental in our legal tradition,[10] but where a statute such as OSHA contains both monetary fines and penalties for conduct that are perhaps only arguably different in quality, the distinction becomes ambiguous in-

10. *Huntington v. Attrill*, 1892, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123, 1133; *Wisconsin v. Pelican Ins. Co.*, 1887, 127 U.S. 265, 8 S.Ct. 1370, 32 L.Ed. 239, 243; *Passavant v. United States*, 1892, 148 U.S. 214, 13 S.Ct. 572, 37 L.Ed. 426; *Bartlett v. Kane*, 1853, 16 How. 263, 14 L.Ed. 931.

deed. The distinctions are additionally blurred when Congress applies both types of enforcement measures to impose standards and regulate conduct in a relatively new arena such as employment safety and health. That is precisely the problem we consider here.

This issue has importance even beyond the case at hand because the streamlined enforcement procedure embodied in OSHA, although presently prescribed in only a few instances, has been recommended as a blueprint for a major revision of the enforcement systems of *all* federal agencies.[11] Therefore, in view of

11. Goldschmid, An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies Report to the Administrative Conference of the United States (1972), pp. 900–901.

Professor Goldschmid has recommended and the Administrative Conference of the United States has adopted the recommendation that federal agencies increase their use of civil money penalties as an alternative to other remedies such as license revocation proceedings in an effort to make their enforcement procedures more flexible and effective.

The present system may also be allowing some of the worst offenders (who will not settle and cannot feasibly be brought to trial) to get away. Even when cases are carried forward, serious enforcement problems are often created by excessive delay. The FAA, for example, recently protested to the Department of Justice about cases involving "the question of safety in air transportation," in which "processing is of great importance," which were being subjected to "excessive delays."

From the standpoint of alleged offenders, the present system is unsatisfactory because, as a practical matter, they are often denied procedural protections and an impartial forum, and may be forced to acquiesce in unfair settlements because of the lack of a prompt and economical procedure for judicial resolution. When, for example, the Bureau of Customs seizes $1,900 worth of goods can an alleged offender—no matter how much he believes in his case—afford to litigate in federal district court rather than settle for $1,200?

Of course, many of the settlements offered by agencies are perfectly fair. But there is every reason to provide an impartial forum and procedural protections *for those few* who wish to question a proposed imposition. The possibilities for arbitrariness, lack of consistency, and discriminatory exercises of authority are unnecessarily accentuated under the present system.

Especially where relatively small sums are involved, the realistic choice is either (i) to provide that *very small percentage* of alleged offenders who wish to litigate (or the agency itself in an equally small number of instances) an opportunity for speedy and inexpensive adjudications under an administrative imposition scheme, or (ii) to deny (on the basis of the theoretical availability of *de novo* judicial review) both sides an impartial forum altogether. For most money penalty cases, the opportunity for a speedy and inexpensive adjudication is basic to a just imposition scheme. Factors whose presence tend to commend the imposition of civil money penalties by agencies themselves are set forth in Part B of the recommendation.

The administrative imposition system proposed would, at the option of either party, provide for an adjudicative proceeding, on the record, pursuant to Sections 5–8 of the Administrative Procedure Act, 5 U.S.C. §§ 554–57 (1970). Agencies are urged to adopt rules of practice which will maximize the possibility of securing just, inexpensive, and speedy adjudications. An agency's decision would be final unless appealed within a stipulated number of days. If an appeal is taken to a United States Court of Appeals, an agency's decision would be sustained if supported by substantial evidence.

An adjudicative proceeding would, of course, prohibit a commingling of adversarial and decisional functions. It is expected that substantial evidence review will be an ultimate, though seldom used, protection against abuse. Procedures for settlement by means of remission, mitigation and compromise would, of course, be retained. Administrative imposition is intended to bring fairer, not necessarily fewer, settlements.

See also footnote 43, *infra*.

the importance of the issue, we analyze it here in terms of (i) the criminal and civil enforcement procedures of OSHA, (ii) the congressional intent discernible from the face of the statute and the legislative history and (iii) the multiple test espoused by the Supreme Court in *Kennedy v. Mendoza-Martinez*.[12]

12. 1963, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644.

13. 29 U.S.C.A. §§ 651, 652(5), 653(a).

§ 651. Congressional statement of findings and declaration of purpose and policy

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the full responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health

The Enforcement Structure of OSHA

Designed with the ambitious but socially laudable goal "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources," [13] OSHA applies to all work-

Note 13—Continued

laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this chapter and accurately describe the nature of the occupational safety and health problems;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

§ 652. Definitions

For the purposes of this chapter—

(1) The term "Secretary" mean[1] the Secretary of Labor.

(2) The term "Commission" means the Occupational Safety and Health Review Commission established under this chapter.

(3) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof.

(4) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

(5) The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.

(6) The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce.

(7) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

(8) The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

(9) The term "national consensus standard" means any occupational safety and health standard or modification thereof which (1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

(10) The term "established Federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on December 29, 1970.

(11) The term "Committee" means the National Advisory Committee on Occupational Safety and Health established under this chapter.

(12) The term "Director" means the Director of the National Institute for Occupational Safety and Health.

(13) The term "Institute" means the National Institute for Occupational Safety and Health established under this chapter.

(14) The term "Workmen's Compensation Commission" means the National Commission on State Workmen's Compensation Laws established under this chapter.

§ 653. Geographic applicability; judicial enforcement; applicability to existing standards; report to Congress on duplication and coordination of Federal Laws; workmen's compensation law or common law or statutory rights, duties, or liabilities of employers and employees unaffected

(a) This chapter shall apply with respect to employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Wake Island, Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act, Johnston Island, and the Canal Zone. The Secretary of the Interior shall, by regulation, provide for judicial enforcement of this chapter by the courts established for areas in which there are no United States district courts having jurisdiction.

ers employed in businesses that affect interstate commerce.[14]

To accomplish this vast objective, Congress passed a labor safety standards form of administrative program. Under OSHA, the Secretary of Labor (Secretary) is vested with the power to both promulgate and enforce compliance with the safety standards set for individual industries throughout the country. As enforcement measures, OSHA provides for both civil and criminal penalties. The Justice Department prosecutes employers in federal district court when job conditions are deemed to warrant criminal prosecution, but the Secretary enforces the civil penalties before the autonomous forum of the OSHRECOM.[15] Since Atlas challenges these specific civil enforcement procedures on the grounds that they violate Article III and the Fifth, Sixth and Seventh Amendments, close scrutiny of the nature and process of civil censure under these provisions is necessary.

The enforcement procedures of OSHA have three stages—citation, administrative hearing, and court review. Each stage is distinct because unless the employer initiates the next level of review, the penalty becomes final and unreviewable.

The citation procedure begins when an inspector, acting in response to a complaint or on his own investigation, determines that the employer has violated either a specific safety standard or the general duty provision requiring the employer to provide a safe working environment.[16] The citation given by the inspector lists the nature of the violation as well as the time set for abatement.[17]

14. President Johnson in 1968 proposed the first comprehensive occupational health and safety program. S. 2,864, 90th Cong., 2nd Sess. (1968). (Senator Yarborough introducing the Administration's proposal). *See also Bureau of National Affairs, Job Safety and Health Act of 1970*, at 16 (1971).

15. Id. § 661.

§ 661. Occupational Safety and Health Review Commission—Establishment; membership; appointment; Chairman

(a) The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter. The President shall designate one of the members of the Commission to serve as Chairman.

16. Id. § 654.

§ 654. Duties of employers and employees

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

See also the discussion by Chief Judge Gibson regarding the specific industrial standards in *American Smelting and Refining Co. v. Occupational Safety and Health Review Commission*, 8 Cir., 1974, 501 F.2d 504.

17. Id. § 658.

§ 658. Citations—Authority to issue; grounds; contents; notice in lieu of citation for de minimis violations

(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 654 of this title, of any standard, rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, he shall with reasonable promptness is-

Within a reasonable time thereafter, the Secretary shall assess and notify the employer of the penalty, if any, that will itself be based on the nature of the violation. For initial violations of OSHA an employer may be subject to a $10,000 penalty for either (1) willful violations[18] or for violations that are determined to be serious,[19] i. e., " • • • [have] a substantial probability that death or serious harm could result from a condition that exists • • • unless the employer did not, and could not with the exercise of due diligence know of the presence of the violation."[20]

Alternatively, criminal proceedings may be triggered by conditions that the Secretary considers both willful and serious and the employer shall upon conviction be subject to a fine of up to $10,000 and six months in jail.[21]

sue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

Posting

(b) Each citation issued under this section, or a copy or copies thereof, shall be prominently posted, as prescribed in regulations issued by the Secretary, at or near each place a violation referred to in the citation occurred.

Time for issuance

(c) No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

18. Id. § 666(a)–(c).

§ 666. Civil and criminal penalties

(a) Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter, may be assessed a civil penalty of not more than $10,000 for each violation.

(b) Any employer who has received a citation for a serious violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, shall be assessed a civil penalty of up to $1,000 for each such violation.

(c) Any employer who has received a citation for a violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of regulations prescribed pursuant to this chapter, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $1,000 for each such violation.

19. Id. § 666(b).

20. Id. §§ 666(b) and (j).

(j) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

21. Id. § 666(e)–(g).

(e) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

(f) Any person who gives advance notice of any inspection to be conducted under this chapter, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both.

(g) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

On receipt of the Secretary's citation, an employer has 15 days to notify the Secretary that he intends to challenge the penalty[22] or the penalty becomes final and unreviewable. Once such a challenge is made, the Secretary is required to initiate the administrative hearing by notifying OSHRECOM.[23] The ALJ conducts a full hearing[24] and thereafter makes a report that will itself become the final decision of OSHRECOM unless the parties seek and the Commission grants discretionary review.[25]

Thereafter the final stage is review in the Court of Appeals and thereafter the

22. Id. § 659(a).

23. Id. § 659(c).

Advisement of Commission by Secretary of notification of contest by employer of citation or notification or of filing of notice by any employee or representative of employees; hearing by Commission; orders of Commission and Secretary; rules of procedure

(c) If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

The Secretary's notification to OSHRECOM of the employer's intention to contest is denominated a formal "complaint" in the record below.

24. Id. § 661(i) and 29 C.F.R. § 2200.72 (1973).

Hearing examiner; determination; report as final order of Commission

(i) A hearing examiner appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such hearing examiner by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the hearing examiner shall become the final order of the Commission within thirty days after such report by the hearing examiner, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

29 C.F.R. § 2200.72 (1973) directs that hearings before the OSHRECOM and its ALJs shall be in accordance with the Administrative Procedure Act, 5 U.S.C.A. § 554 (1967) and the Federal Rules of Evidence shall be applicable.

25. 29 U.S.C.A. § 661(i) (1974); 29 C.F.R. § 2200.91, as revised, 37 F.R. 20237, 20242. In the case of Atlas since no member of the Commission directed that the decision of the ALJ be reviewed, it became final on May 7, 1973.

discretionary review by the Supreme Court.[26] The Court of Appeals review is on the APA substantial-evidence-on-the-record-considered-as-a-whole-standard. The Court, however, may direct the Commission to consider additional evidence if it is found that the evidence is both material and reasonable grounds existed for the failure to admit it in the hearing before the Commission.[27]

One additional feature of OSHA that Atlas sharply contests is § 659(b). This provision allows the Secretary retroactively to assess an additional non-abatement penalty for each day following the expiration of the initial abatement period whenever he determines that the employer did not initiate the review procedures (either before the Commission or the Court of Appeals) in good faith or did so only in order to avoid the penalties imposed.

On The Face Of OSHA

The Government argues that OSHA successfully survives the Atlas Sixth Amendment attack because the provisions for civil and criminal enforcement specified in the statute are precise and distinct and, additionally, because the legislative history clearly demonstrates that Congress purposefully chose remedial rather than punitive consequences to accompany the civil provisions. The Government naturally stresses the long accepted maxim that Congress may use either civil or criminal measures to control similar conduct. But although Congress has enormous flexibility in the selection of enforcement measures, the existence of both civil and criminal alternatives does not alone suffice to validate the statute.[29] Similarly, the absence of any mention of punishment in the legislative history does not immunize the statute from further review.[30] Although acknowledging the seriousness of the potential penalties the one court that has presently considered these challenges to the statute has upheld it.[30]

The criticism elicited by the statute,[31] and the enormous potential effects of a proliferation of OSHA-like enforcements systems are factors that persuade us that we should carefully scrutinize the statute against the case-law experience.

Functional Analysis Of Congressional Intent

[1, 2] The starting place is the Supreme Court's decision in *Kennedy v. Mendoza-Martinez*[32] to test Congressional intent and permissible Congressional latitude in prescribing civil rather than criminal consequences.

26. See 29 U.S.C.A. § 660(a). The only provision for District Court participation in the imposition of civil penalties under OSHA is contained in 29 U.S.C.A. § 666(k). If not administratively collected, the Secretary may bring an action in the District Court to recover the civil penalties imposed by the Commission, but there is to be no relitigation of the question of liability or the amount of the civil penalty itself.

27. 29 U.S.C.A. § 660(a).

28. See *Lipke v. Lederer*, 1922, 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061, 1065.

29. *Trop v. Dulles*, 1957, 356 U.S. 86, 94, 78 S.Ct. 590, 2 L.Ed.2d 630.

30. See *Frank Irey, Jr., Inc. v. OSHA*, 3 Cir., 1974, — F.2d — [rehearing en banc granted, Dec. 20, 1974]. On the eve of filing our opinion the Court en banc sustained the panel, holding the Act valid against Seventh Amendment attacks. — F.2d — [July 24, 1975]

31. *See* Hay, OSHA Penalties: Some Constitutional Considerations, 10 Idaho L.Rev. 223 (1974); 10 Hous.L.Rev. 426, 437 (1973).

32. 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644.

The Court summed up the factors:

[I] Whether the sanction involves an affirmative disability or restraint, [II] whether it has historically been regarded as a punishment, [III] whether it comes into play only on a finding of scienter, [IV] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [V] whether the behavior to which it applies is already a crime, [VI] whether an alternative purpose to which it may rationally be connected is assignable for it, and [VII] whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.[33]

[I] "Whether the sanction involves an affirmative disability or restraint." This first test gives some weight to Atlas' arguments because even though monetary penalties do not fit within the conventional definition of disability,[34] i. e., want of legal capability, they do inflict a pocket-book deterrence or restraint on the recipient.

[II] "Whether the sanction has historically been considered a punishment."[35] This is of little aid to Atlas. While it is true, as Atlas argues, that fines have long been used as an alternative punishment, that argument, when used here, begs the question for civil monetary penalties have in a similar manner long been accepted where they served a remedial rather than a punitive function.[36] And we come full circle again to the question of the remedial function of the Act.

[III] "Whether the sanction is activated only upon a finding of scienter." This gives Atlas little support for its ar-

33. Id. at 168, 83 S.Ct. at 568. Bracketed numbers have been inserted for ease of reference.

34. For factor [I] the Supreme Court cited: *Ex parte Garland*, 1866, 4 Wall. 333, 377, 18 L.Ed. 366, 369 (exclusion from practice of law in the courts of the United States); *United States v. Lovett*, 1946, 328 U.S. 303, 316, 66 S.Ct. 1073, 90 L.Ed. 1252, 1259 (denial of federal employment); *Flemming v. Nestor*, 1960, 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435, 1448 (denial of a non-contractual government benefit held not to be a punishment).

35. For factor [II] the Supreme Court cited: *Cummings v. Missouri*, 1866, 4 Wall. 277, 320-21, 18 L.Ed. 356, 362 (disqualification from lawful advocation as a clergyman held to be punishment); *Ex parte Wilson*, 1885, 114 U.S. 417, 426-29, 5 S.Ct. 935, 29 L.Ed. 89, 92 (imprisonment at hard labor held to be infamous punishment necessitating the right to grand jury indictment); *Mackin v. United States*, 1886, 117 U.S. 348, 350-52, 6 S.Ct. 777, 29 L.Ed. 909-911 (imprisonment and hard labor held to be infamous punishment); *Wong Wing v. United States*, 1896, 163 U.S. 228, 238, 16 S.Ct. 977, 41 L.Ed. 140 (imprisonment and hard labor).

36. *Trop v. Dulles*, 1958, 356 U.S. 86, 96-97, 78 S.Ct. 590, 595, 2 L.Ed.2d 630, 640.

But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.[30] The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote.[31] If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.

gument. While § 666(b), the provision under which Atlas was cited, appears superficially to be a "strict liability" provision imposing a mandatory penalty whenever an employer is cited for a serious violation, an employer may defend against such a charge on the grounds that he "did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."[37] Of course, the fact that OSHRECOM may consider the good faith of the employer and previous violations in determining the appropriateness of the assessed civil penalty[38] does not orbit to the apogee of a suspected scienter factor.

But this is not a requirement analogous to the criminal law concept embraced in the conclusory "scienter" concept. The employer has a defense if he did not nor should not have known. But this is a far cry from limiting his obligations to situations in which he knowingly and intentionally acted or refrained from acting. The statute itself expressly distinguishes between acts which on usual tort principles are charged to employers and those willfully done.[39]

[IV] "Whether the statute promotes the traditional aims of punishment, retribution and deterrence."[40] This lends some weight to both sides. In Atlas' favor, retributive effect may be seen in the statutory provisions that civil penalties shall be assessed according to the gravity of the violation.[41] Similarly, OSHA may be said to have a deterrent effect in the sense that the penalties assessed against the employers compel compliance with the safety standards.

But the government argues that deterrence is not the function solely of a criminal statute. It contends that "remedial" means not only compensatory but a kind of prospective deterrence of a means to encourage compliance with the government regulation. As examples it cites the extensive series of cases flowing from the seminal *Oceanic Steam*

37. 29 U.S.C.A. § 666(j).

Of the two other civil penalties allowed for initial violations, one § 666(a) permits citation for willful violations and the other § 666(c) permits penalties for non-serious violations irrespective of scienter.

38. 29 U.S.C.A. § 666(i).

39. See *American Smelting & Refining Co. v. Occupational Safety & Health Commission*, 8 Cir., 1974, 501 F.2d 504. We intimate no view on the status of a "willful" charge as criminal or civil.

40. The Supreme Court cited for [IV] factor: *United States v. Constantine*, 1935, 296 U.S. 287, 295, 56 S.Ct. 223, 80 L.Ed. 233, 238 (a purported "special excise tax" assessed against those retail liquor dealers doing business contrary to the local state or municipal law held to be a penalty for unlawful liquor sale rather than a tax); *Trop v. Dulles*, 1958, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630, 641, 648–49 (penalty of expatriation for servicemen who deserted during time of war held to be a punishment).

41. 29 U.S.C.A. § 666(i). See also 10 Hous.L.Rev. at 442 where the author argues that in addition to the commission's powers to consider the gravity of the offense in assessing penalties, retributive effect is discernable in OSHA because it provides two penalties where the identical behavior results in varying degrees of harm. But, while it is true that §§ 666(a) provide for civil penalties for willful violations and 666(e) does provide for criminal penalties if death occurs, one is not compelled to draw a comparison between a criminal and a civil sanction for the purpose of determining whether the entire statute has a retributive effect. It is entirely proper for a criminal sanction to have a retributive effect and similarly it is only to be expected that Congress would conclude that a statutory scheme should be designed to impose upon the more serious conduct criminal rather than civil penalties alone.

Navigation Co. v. Stranahan[42] for the proposition that the government may appropriately assess monetary penalties by administrative enforcement as a function of its absolute power—within Constitutional limits—to control matters within the competence of the National sovereign. While these cases involve specific areas that have traditionally been considered the exclusive province of the federal government, such as tariffs and immigration, the government properly argues that there is no reason for so limiting their application. In support of this the government cites numerous statutes permitting civil penalties to be imposed by the administrative agency for violations of its regulation or orders.[43]

42. 1909, 214 U.S. 320, 29 S.Ct. 671, 53 L.Ed. 1013; *Lloyd Sabaudo Societa v. Elting*, 1932, 287 U.S. 329, 333–35, 53 S.Ct. 167, 77 L.Ed. 341; *Elting v. North German Lloyd*, 1932, 287 U.S. 324, 53 S.Ct. 164, 77 L.Ed. 337; *Hepner v. United States*, 1909, 213 U.S. 103, 29 S.Ct. 474, 53 L.Ed. 720; *Passavant v. United States*, 1893, 148 U.S. 214, 13 S.Ct. 572, 37 L.Ed. 426; *Bartlett v. Kane*, 1885, 16 How. 263, 14 L.Ed. 931.

43. The appendix to Professor Goldschmid's Report (see footnote 11, *supra*) is instructive on the issue.

EXHIBIT 1
to
APPENDIX A

Illustrative Catalogue of Statutory Provisions Pursuant to Which Federal Administrative Agencies (or the Courts) Impose Civil Money Penalties

Agency-Citation	Purpose	Penalty
Executive Departments—Agriculture:		
7 U.S.C. § 1314(a) (1970).	Marketing of tobacco in excess of marketing quota.	75% of average market price of tobacco for preceding year.
7 U.S.C. § 1340(2) (1970).	Marketing of wheat in excess of marketing quota.	65% of parity price per bushel of wheat.
7 U.S.C. § 1346(a) (1970).	Marketing of cotton in excess of marketing quota.	50% of parity price per pound of cotton.
7 U.S.C. § 1356(a) (1970).	Marketing of rice in excess of marketing quota.	65% of parity price per pound of rice.
7 U.S.C. § 1359(a) (1970).	Marketing of peanuts in excess of marketing quota.	75% of the support price for peanuts.
7 U.S.C. § 1155(a) (1970).	Sugar knowingly marketed or imported in excess of sugar quotas.	Three times market value of the sugar.
7 U.S.C. § 1155(b) (1970).	Sugar imported and processed as raw sugar which is determined to be direct-consumption sugar.	$0.01 per pound in excess of direct-consumption sugar quota.

[Footnote 43 continued]

Agency–Citation	Purpose	Penalty
Executive Departments— Continued		
Agriculture— Continued		
7 U.S.C. § 1433 (1970).	Misuse of feed intended to relieve distress or preserve foundation herds.	Market value of the feed involved.
7 U.S.C. § 1379i(a) (1970).	Failure to conform to the Secretary's requirements for domestic wheat marketing certificates, export marketing certificates, or other required certificates.	Twice the face value of the marketing certificates.
7 U.S.C. § 610(c) (1970).	Willful disclosure of confidential marketing information.	$100.
7 U.S.C. § 499c(a) (1970).	Failure of broker to obtain license.	Up to $500 each offense; up to $25 for each day it continues.
45 U.S.C. §§ 73, 74 (1970).	Failure to properly care for animals in transit.	$100–$500.
7 U.S.C. § 1596(b) (1970).	Violation of provisions of Federal Seed Act.	$25–$500.
7 U.S.C. § 203 (1970).	Failure to register stockyard.	Up to $500/each offense, up to $25 for each day it continues.
7 U.S.C. § 207(g) (1970).	Failure to comply with rate provisions, regulations or orders.	Up to $500/each offense, up to $25 for each day it continues.
7 U.S.C. § 215(a) (1970).	Failure to obey Secretary's order concerning rates discrimination or deceptive practices.	$500/each offense.
7 U.S.C. § 2149(a) (1970).	Animal Welfare Act of 1970.	$500/each offense.
15 U.S.C. § 1825(a) (1970).	Horse Protection Act of 1970.	$1000/each offense.
Commerce:		
a. FTZB: 19 U.S.C. § 81S [81s] (1970).	Foreign Trade Zones	Up to $1000.
b. BIC: 50 U.S.C. § 2405(c) (1970).	Violation of provisions or regulations concerning import control.	Up to $1000.
c. NOAA:		
16 U.S.C. § 772f (1970).	Records and reports	$50/each violation.
16 U.S.C. § 957(d) (1970).	Knowingly shipping, transporting, etc., any fish taken or retained in violation of regulations.	(1) Up to $25,000 for the first violation, (2) up to $50,000 for subsequent violations.

[Footnote 43 continued]

Agency–Citation	Purpose	Penalty
Executive Departments— Continued		
Commerce— Continued		
16 U.S.C. § 957(e) (1970).	Failure to keep statistical records, etc.	(1) Up to $1,000 for the first violation; (2) up to $5,000 for subsequent violations.
16 U.S.C. § 957(f) (1970).	Importation of certain species of fish contrary to regulation.	Up to $100,000.
16 U.S.C. § 989(o) (1970).	Violation of any provision of or regulation under N.W. Atlantic Fisheries Act.	(a) Up to $500 for the first violation (b) up to $1000 for subsequent violations.
d. MA: 46 U.S.C. §§ 808, 835 (1970)	Violation of Shipping Act	Money penalty in lieu of forfeiture from $500 to $1000.
Interior:		
18 U.S.C. § 43(c) (1970).	Transportation of wildlife taken in violation of State, national, or foreign laws.	Up to $5000 for each violation.
30 U.S.C. § 819(a) (1) (1970).	Violations of coal mine health and safety standards.	Up to $10,000 for each violation.
30 U.S.C. § 819(a) (2) (1970).	Willful violation of standards relating to smoking.	Up to $250.
Justice:		
a. BNDD: 21 U.S.C. § 842 (1970).	Unlawful distribution of a controlled substance, failure to keep records, unlawful use of seal placed on such substances.	Up to $25,000.
b. INS:		
8 U.S.C. § 1221(d) (1970).	Failure of manifests for shipments or aircraft to comply with the requirements of this section.	$10 per person not included in the manifest.
8 U.S.C. § 1223(c) (1970).	Failure to comply with provisions concerning examination upon arrival.	Cost of maintenance including detention expense; $300 for each violation.
8 U.S.C. § 1227(b) (1970).	Failure to provide immediate deportation of aliens excluded from admission (or entering in violation of law).	Same as above.
8 U.S.C. § 1229 (1970).	Violation of any regulation concerning ports of entry for aliens arriving by aircraft.	$500.

[Footnote 43 continued]

Agency–Citation	Purpose	Penalty
Executive Departments— Continued		
Justice— Continued		
8 U.S.C. § 1253(c) (1970).	Deportation proceedings within 5 years after the entry of the alien for causes existing at time of arrival.	Cost of deportation to owner of vessel.
8 U.S.C. § 1281(d) (1970).	Failure to deliver true and accurate list of alien crewmen.	$10 for each alien not reported.
8 U.S.C. § 1284(a) (1970).	Failure to detain alien crewman until an immigration officer has inspected the crewman.	$1000 for each failure.
8 U.S.C. § 1285 (1970).	Employment on passenger vessels or aircraft of aliens afflicted with certain disabilities.	$50 for each alien.
8 U.S.C. § 1286 (1970).	Unlawful discharge in United States of alien crewman.	$1000 for each violation.
8 U.S.C. § 1321 (1970).	Failure to prevent the unauthorized landing of aliens.	$1000 for each violation.
8 U.S.C. § 1322(a)(b) (1970).	Bringing in aliens subject to disability or afflicted with certain diseases.	$1000 or $250 depending on the alien's condition.
8 U.S.C. § 1323(a)(b) (1970).	Unlawful bringing of aliens into United States.	$1000 for each violation.
8 U.S.C. § 1287 (1970).	Intent to evade immigration laws or bring alien crewmen into United States with intent to evade immigration laws.	Up to $5000 each violation.
Labor with OSHRC: 29 U.S.C. § 666 (1970).	Occupational safety and health:	
	(a) willful or repeated violations.	(a) up to $10,000.
	(b) other violations.	(b) up to $1,000.
Transportation:		
a. NHTSA: 15 U.S.C. § 1398(a) (1970).	Failure to comply with safety standards.	Up to $1,000 for each violation and $400,000 per related series of violations.
b. FAA: 49 U.S.C. § 1471(a)(1) (1970).	Violation of provisions and regulations.	Up to $1,000 for each violation.
c. FRA:		
45 U.S.C. § 64a(a) (1970).	Hours of service	$500 for each violation.
45 U.S.C. §§ 6, 13 (1970).	Safety appliance.	$250 for each violation.
45 U.S.C. § 34 (1970).	Locomotive inspection.	$250 for each violation.

[Footnote 43 continued]

Agency–Citation	Purpose	Penalty
Executive Departments— Continued		
Transportation— Continued		
49 U.S.C. § 27 [26] (h) (1970).	Signal inspection.	$100 for each violation and $100 for each day violation continues.
45 U.S.C. § 438(b) (1970).	Violation of provisions and regulations.	$250–$2,500; each day considered a separate violation.
d. USCG:		
33 U.S.C. § 157a (c) (1970).	Navigating or operating a vessel under bridges in violation of regulations.	Up to $500.
33 U.S.C. § 158 (1970).	Penalty for violations of chapter 3 (navigation rules for harbors, rivers, and inland waters) by pilot, engineer, mate, or master.	Up to $500.
[The USCG enforces 85 other civil money penalty provisions.]		
e. FHWA: 49 U.S.C. § 322(h) (1970).	Violation of various motor carrier safety regulations by certain motor carriers.	$500 for each offense and up to $250 for each additional day.
Treasury:		
a. IRS:		
Internal Revenue Code § 6651(a).	Failure to file tax return or to pay tax.	0.5%–25%.
Internal Revenue Code § 6652.	Failure to file certain information returns.	$1–$25,000.
Internal Revenue Code § 6653(a)(b).	Failure to pay tax through:	
	(1) negligence	(1) 5% of underpayment.
	(2) fraud	(2) 50% of underpayment.
[The IRS enforces 18 other civil money penalty provisions.]		
b. Customs:		
19 U.S.C. § 292 (1970).	Failure to file manifests going to or leaving place where there is no custom house.	$20 each offense.
19 U.S.C. § 469 (1970).	Dealing in or using empty stamped imported liquor containers.	$200 for each cask.
[Customs enforces 33 other civil money penalty provisions.]		
c. ODGSO: 31 U.S.C. § 443 (1970).	Acquisition and use of gold in violation of law.	Twice the value of the gold and forfeiture, seizure and condemnation of property.

[Footnote 43 continued]

Agency–Citation	Purpose	Penalty
Executive Departments—Continued		
Independent agencies:		
AEC: 42 U.S.C. § 2282 (1970).	Violations of licensing requirements.	Up to $5,000 for each violation to a maximum total penalty of $25,000 within 30 days.
CAB: 49 U.S.C. § 1471(o) [(a)] (1970).	Violation of provisions and regulations.	Up to $1000 for each violation.
49 U.S.C. § 1474(a) (1970).	Violations regarding application of existing laws relating to foreign commerce.	$500/each offense.
FCC:		
47 U.S.C. § 202(c) (1970).	Common carrier—discrimination and preferences.	$500 each offense and $25 for each day of continuance of offense.
47 U.S.C. § 214(d) (1970).	Common carrier—extension of lines.	$100/day.
47 U.S.C. § 503(b) (1970).	Broadcast-stipulated violations.	Up to $1,000 per violation and total of not more than $10,000.
47 U.S.C. § 510(a) (1970).	Stipulated violations	Up to $100/violation and a total of not more than $500.
[The FCC enforces 6 other civil money penalty provisions.]		
EPA:		
42 U.S.C. § 1857F–4 [1857f–4] (1970).	Violation of provisions or regulations relating to interstate dealings in automobile and engines not meeting exhaust emission standards.	Up to $10,000.
42 U.S.C. § 1857d(j)(2) (1970).	Failure to submit reports	$100 per day.
33 U.S.C. § 1161(f)(2) (1970).	Violation of provisions and regulations of Federal Water Pollution Act.	Up to $5,000 [$8,000,000]
FHLBB:		
12 U.S.C. § 1425a(d) (1970).	Deficiency with liquidity requirements under the Federal Home Loan Bank Act.	Up to the highest rate of advances of one year, plus 2% per annum.
12 U.S.C. § [illegible]5b(b) (1970).	Violation of rule	Up to $100/per violation.
[The FHLBB enforces 4 other civil money penalty provisions.]		
FMC: 46 U.S.C. § 801 *et seq.* (1970).	Violation of statutory provisions.	Up to $5,000.

[Footnote 43 continued]

Agency–Citation	Purpose	Penalty
Executive Departments—Continued		
FRS:		
12 U.S.C. § 324 (1970).	Failure to make reports of conditions and of payment of dividends to Federal Reserve bank.	$100/day till submission.
12 U.S.C. § 334 (1970).	Failure to furnish reports from affiliates.	$100/day till submission.
12 U.S.C. § 374a (1970).	Acting as agent for non-banking borrower in making loans on securities to dealers in stocks, bonds, etc.	Up to $100/day.
12 U.S.C. § 377 (1970).	Affiliation with organization dealing in securities.	Up to $1,000/day.
12 U.S.C. § 1908(a) (1970).	Willful violation of any regulation under chapter 20, credit control.	Up to $1,000.
FTC:		
15 U.S.C. 45(*l*) (1970).	Violation of cease and desist order.	Up to $5,000/each violation; each day a violation.
15 U.S.C. 65 (1970).	Export trade, failure to supply required information.	$100/each day of failure.
15 U.S.C. 68d(b) (1970).	Wool products labeling, failure to maintain records.	$100/each day of failure.
15 U.S.C. 69f (1970).	Fur products labeling, failure to maintain records.	$100/each day of failure.
15 U.S.C. 21(*l*) (1970).	Violation of order of Commission.	Up to $5,000/each violation; each day a violation.
ICC:		
49 U.S.C. § 1 (12) (1970).	Failure to prorate	$100/each offense.
49 U.S.C. § 1 (17)(a) (1970).	Failure to comply with order.	$100–$500 for each offense and $50/day.
[The ICC enforces 10 other civil money penalty provisions.]		
SEC: 15 U.S.C. § 78ff(b) (1970).	Failure to file information, documents or reports.	$100 for each day.
SBA: 15 U.S.C. § 687g (1970).	Violation of any regulation or written directive requiring the filing of a report.	Up to $100/per day for each day of continuance.

And when it comes to the factor of deterrence, the existence of over 200 million citizens most of whom are law abiding and who daily conduct their business and personal affairs without the fear of jail time or being tagged a felon, we know the greater efficacy of the much milder and less potent sanction of loss of license, civil penalties and the like. Business is encouraged to comply with the law not only because that is what the law exacts but because failing to do so will bring down on the activity or purse noncriminal consequences.

[V] "Whether the behavior to which it applies is already a crime."[44] This fits

[Footnote 43 continued]

Agency–Citation	Purpose	Penalty
Executive Departments—Continued		
Postal Service:		
39 U.S.C. § 5206 (1970).	Failure to perform mail transportation services as required.	(a) up to $500 for each day the carrier refuses, (b) an amount the Postal Service deems reasonable, (c) deductions from compensation.
39 U.S.C. § 5603 (1970).	A common carrier by water fails or refuses to transport the mail.	Up to $500 for each day the carrier refuses.
49 U.S.C. § 1471(a) (1970).	Violation of regulations	Up to $1,000 for each such violation.

In addition, included below are several statutes providing for civil penalties which have been enacted since the compilation of Professor Goldschmid:

1. Ports and Waterways Safety Act of 1972, 46 U.S.C. 391a(11)(A) (1972 supp.).
2. Shipping Act amendments, 86 Stat. 653.
3. Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1319(d), 1320(d), 1321(b), (j)(2), 1322(j) (1972 supp.).
4. Revenue sharing (Act of Oct. 20, 1972), 26 U.S.C. § 6687(a) (1972 supp.).
5. Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. § 136*l*-1 (1972 supp.).
6. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1375 (1972 supp.).
7. Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415 (a) (1972 supp.).
8. Bald Eagle Protection Act, as amended, 16 U.S.C. § 668(b) (1972 supp.).
9. Consumer Product Safety Act, 15 U.S.C. § 2069 (1972 supp.).
10. Endangered Species Act of 1973, 16 U.S.C.A. § 1540(a) (1974 supp.).

We note, however, that in only four of these instances does the agency whose regulations the defendant is accused of violating have the authority to itself impose a fine without a de novo review in the courts. These are the Immigration and Naturalization Service, OSHA, the Federal Home Loan Bank Board and the Postal Service.

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44. As to factor [V] the Supreme Court cited: *Lipke v. Lederer*, 1922, 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061 (tax under Volstead Act levied against one charged with liquor viola-

squarely on the Government's side of the score board. Although two sections of OSHA provide that the same conduct may be subject to both civil and criminal sanctions,[45] the remaining civil penalties are the sole enforcement measures provided under the Act. Atlas argues, however, that as to corporate defendants who are not subject to imprisonment, the civil sanctions are effectively the same as the criminal fines. But except in the one instance we noted, this argument appears to be incorrect especially if we consider Atlas' case as an example. Atlas was charged with a serious violation carrying a mandatory penalty of up to a thousand dollars.[46] While we have no difficulty (as discussed later) in upholding the ALJ decision of violation, this record would not permit—and OSHRECOM does not assert—that the conduct of Atlas constituting a violation of the regulation would have permitted prosecution for criminal fines.

[3] Additionally, Atlas throws in the outworn argument that OSHA fails under the criminal vs. civil test because civil penalties are being imposed for what are essentially building code violations punishable by criminal sanctions under most state and municipal law. Now in the Twentieth Century it is too late to assert that there is anything improper in the election by Congress to impose its own sanctions—civil, criminal or both—without regard to its treatment by other components of our federalism.[47]

[VI] "Whether an alternative purpose other than punishment may rationally be ascribed to the sanction."[48] Actually,

tions held invalid because the sanction had the characteristics of a fine, not a tax); *United States v. La Franca*, 1931, 282 U.S. 568, 572-73, 51 S.Ct. 278, 75 L.Ed. 551 (the same holding); *United States v. Constantine, supra*, 296 U.S. at 295, 56 S.Ct. 223 (similar holding but condition of tax was commission of crime under state law).

45. 29 U.S.C.A. § 666(a).

§ 666. Civil and criminal penalties

(a) Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter, may be assessed a civil penalty of not more than $10,000 for each violation. 29 U.S.C.A. § 666(e).

(e) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

46. 29 U.S.C.A. § 666(b).

47. *Helvering v. Mitchell*, 1938, 303 U.S. 391, 399, 58 S.Ct. 630, 82 L.Ed. 917.

48. The Supreme Court cited for factor [VI]: *Cummings v. Missouri*, 1866, 4 Wall. 277, 18 L.Ed. 356 (state could not require a priest to pledge that he had never attempted to avoid military service by entering or leaving the state as a precondition to administering the sacraments of his church); *Fong Yue Ting v. United States*, 1893, 149 U.S. 698, 730, 13 S.Ct. 1016, 37 L.Ed. 905 (deportation held to be not punishment); *Hawker v. New York*, 1898, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (exclusion from practice of medicine following conviction for felony held to be an incident of State's power to protect health and safety, not additional punishment); *De Veau v. Braisted*, 1960, 363 U.S. 144, 157-60, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (disqualification of ex-felons from holding office in waterfront unions held within regulatory power of State to control union racketeering, not additional punishment); *United States v. Doremus*, 1919, 249 U.S. 86, 39 S.Ct. 214, 63 L.Ed. 493 (provisions of Narcotic Drug Act for subjecting the sale

this factor is one which must be carefully restricted.[49] Unless caution is exercised, it puts the judiciary squarely in the middle of choices as to the kinds of remedies open and those most likely to achieve the legislative aim. What do Judges know about hazards of industry save what they see in the tragic case after the event of death or injury? Congress meant to put an end to the maiming or death of thousands. What facilities do Judges have for making inquiry into or evaluating what is the method best calculated to bring about the saving of life and limb?[50]

[4] [VII] "Whether the sanction appears excessive when compared with the alternative purpose assigned."[51] While this certainly is a subjective factor, it is one that Atlas' arguments fail to hurdle as well. The remedial functions obviously served by the civil penalties of OSHA may in many circumstances justify imposing the maximum penalties available under the statute. These penalties will often be reduced by the mitigating factors that the imposing agency must consider in assessing the penalty.[52] For example, Atlas' own $600 penalty represents a reduction of $400 after the Secretary had considered the gravity of the offense, the size of the business, the good faith of the employer and the history of previous violations. We cannot say that that penalty is excessive if in the considered judgment of the Administrative Agency it results in improved industrial practices that help to prevent future deaths from falls of employees of Atlas.

[5] The Supreme Court was conscious in *Kennedy v. Mendoza-Martinez* that the test it announced might point in divergent directions,[53] but each test was considered relevant to a determination of the character of a statute. While the

and distribution of drugs to official supervision and inspection held to have a reasonable relation to enforcement of special tax on sale and distribution of such drugs); *Child Labor Tax Case*, 1922, 259 U.S. 20, 43, 42 S.Ct. 449, 453, 66 L.Ed. 817, 820 ("* * * the provisions of the so-called taxi act must be naturally and reasonably adapted to the collection of the tax, not solely to the achievement of some other purpose plainly within state power.") *Lipke v. Lederer*, *supra*, 259 U.S. at 561–62, 42 S.Ct. 549 (attacks as a penalty when its primary function is to define and suppress crime rather than provide for the support of the government); *Trop v. Dulles*, *supra*, 356 U.S. at 96–97, 78 S.Ct. 590 (expatriation was held to have "no other legitimate purpose" than to punish); *Flemming v. Nestor*, 1959, 363 U.S. 603, 615, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (disqualification of specific deportees from eligibility for Social Security benefits while not lawfully in the Country held to bear rationale relation to the purposes of statute therefore not a penalty).

Admin.News, page 5177 (1970). [Senate Report No. 91-1282] (Minority Report).

50. *See generally Frank Irey, Jr., Inc. v. OSHA*, *supra*, — F.2d at page — and note 30 *supra*.

51. The Supreme Court cited for factor [VII]: *Helwig v. United States*, 1903, 188 U.S. 605, 610–12, 23 S.Ct. 427, 47 L.Ed. 614, 616 (an additional duty imposed for undervalued customs declaration greatly in excess of the maximum amount of regular duty); *United States v. Constantine*, 1935, 296 U.S. 287, 295, 56 S.Ct. 223, 80 L.Ed. 233, 238 (special excise tax of $1,000 for retail liquor dealers in business contrary to state law, compared with $25 excise tax for lawful dealers); *Rex Trailer Co. v. United States*, 1956, 350 U.S. 148, 154, 76 S.Ct. 219, 100 L.Ed. 149, 155 ($2,000 upheld as liquidated damages for fraudulent purchase of war surplus goods were it not so unreasonable or excessive as to convert the damages to a penalty).

52. 29 U.S.C.A. § 666(j).

53. *Supra*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d at 660–62.

civil penalties of OSHA are subject to scrutiny under several of these tests, taken as a whole, we think that Atlas has failed to demonstrate that Congress meant the statute to reprimand rather than regulate. The focus of the statute—the control of job site safety practices and health conditions—has a demonstrable and legitimate government concern. The fact that the civil enforcement sanctions are inherently disabilities does not alter the nature of the Congressional purpose.[54] And finally the Congressional purpose carefully to establish both civil and criminal sanctions and distinguishable procedures for imposing and reviewing them eliminate any question of Congressional intent. As Judge Friendly puts it.

> "When Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word."[55]

For those reasons Atlas, despite its strenuous efforts to show the punitive character of OSHA, must fail on this issue.

III. The Seventh Amendment Challenge

[6] Failing the Sixth Amendment and Article III hurdle, Atlas further argues that even if the penalties are termed civil, the Seventh Amendment requires that Congress provide a system of enforcement that gives employers the opportunity to put their case before a jury in a de novo proceeding in the District Court.[56] As support, Atlas cites *United States v. J. B. Williams Co.*[57] in which the Second Circuit held that a defendant had the right to a trial by jury in an action brought by the Attorney General in the District Court under 15 U.S.C.A. § 56 for violations of an F.T.C. cease-and-desist order, and the dissenting opinion of Judge Gibbons in *Frank Irey, Jr., Inc. v. OSHA*, *supra*. *Williams*, however, is readily distinguishable for there the only means of statutory enforcement was by way of the federal courts. Where adjudicative responsibility rests only in the administering agency, "jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the [agency's] role in the statutory scheme." *Curtis v. Loether*, 1974, 415 U.S. 189, 94 S.Ct. 1005, 1008, 39 L.Ed.2d 260, 266; see also *Pernell v. Southall Realty*, 1974, 416 U.S. 363, 94 S.Ct. 1723, 40 L.Ed.2d 198. The Second Circuit in *Williams* was cognizant of this distinction and held merely that where the United States brings a traditional civil suit in the District Court juries must be provided.

That the civil sanction under attack is in the form of a dollar penalty is not a sufficient distinction to deny the power of Congress to prescribe an administrative, as distinguished from a judicial mechanism. To so hold would produce the absurd spectacle of Congress—having full power to prescribe an administrative structure with sanctions of denial

54. *Trop v. Dulles*, *supra*, 356 U.S. 97, 78 S.Ct. 590, 2 L.Ed.2d at 639–40.

55. *United States v. J. B. Williams Co., Inc.*, 2 Cir., 1974, 498 F.2d 414, 421.

56. Although this issue was not clearly specified in Atlas' excellent brief, we conclude that since it was vigorously urged on oral argument and Atlas filed a motion in the administrative proceedings demanding a jury trial (see note 6, *supra*) it would be overly technical to conclude that the issue was not before us.

57. *Id.*

or revocation of a life-or-death license (see the large number of such statutes at note 43, *supra*)—being denied the power to prescribe a money fine of a single dollar or for that matter a single red sou.

IV. Due Process Issue

[7] Atlas objects to the provisions of 29 U.S.C.A. § 659(b) that—in the absence of a challenge by the employer—allows the Secretary's citation and penalty to become the final order of OSHRECOM. The argument is that the employer's affirmative burden to initiate the adversary proceedings violates due process.[58] In support, Atlas cites *Bell v. Burson*, 1971, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90; *Goldberg v. Kelly*, 1973, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287; *Sniadach v. Family Finance Corp.*, 1969, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349. But Atlas misunderstands the focus of these decisions. The essence of the *Sniadach* cases is not that the "aggrieved" person had to shoulder the burden of securing a hearing but that the detriment occurred *first* before *any* opportunity for a meaningful hearing was afforded. Thus the question is—are there detriments imposed on employers under OSHA prior to the timing of the hearing? Arguably, had we accepted Atlas' criminal penalties contention, the Secretary's citation itself could be said to carry criminal stigma but we have rejected that argument. Consequently, the only real detriment to the employer is the monetary penalty which is only imposed after there has been an opportunity to be heard.

The Deep Freeze How Chilling?

[8] Last among its constitutional challenges, Atlas argues that the overall penalty structure of OSHA violates due process because it "chills" the employer's right to seek review of the citation penalty. Arguably, it does this in two ways: First, on review the OSHRECOM has authority to increase the penalty in consideration of such factors as ". . . the good faith or the employer . . ."[59] Thus, the OSHRECOM could theoretically use this power in the same "vindictive" manner forbidden by the Supreme Court in *North Carolina v. Pearce*[60] to punish by penalty increases under the bad faith rubric those employers who exercise their right to review. Second, the possibility that—absent a stay—penalties

58. This contention was impliedly rejected in *Yakus v. United States*, 1944, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 where the Supreme Court held that §§ 203 and 204 of the Emergency Price Control Act of 1942, 50 U.S.C.A. App. § 924, that allowed challenges to the validity of regulations to be raised solely by protest to the Administrator and not as a subsequent defense to a criminal prosecution for violation of the regulations. After finding that the procedure allowed sufficient time and opportunity to present evidence the Court restated the basic concept of constitutional waiver:

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *O'Neil v. Vermont*, 144 U.S. 323, 331, 12 S.Ct. 693, 696, 36 L.Ed. 450; *Barbour v. Georgia*, 249 U.S. 454, 460, 39 S.Ct. 316, 317, 63 L.Ed. 704; *Whitney v. California*, 274 U.S. 357, 360, 362, 380, 47 S.Ct. 641, 642, 643, 650, 71 L.Ed. 1095. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. *Seaboard Air Line Ry. Co. v. Watson*, 287 U.S. 86, 53 S.Ct. 32, 77 L.Ed. 180, 86 A.L.R. 174.

59. 29 U.S.C.A. § 666(i).

60. 1969, 395 U.S. 711, 725, 89 S.Ct. 2072, 23 L.Ed.2d 656.

will cumulate with each violation being considered a separate one for the entire period of the appeal if OSHRECOM finds that an earlier appeal to OSHRECOM or the Court of Appeals was not in good faith or solely for the purposes of delay or avoidance of penalties. 29 U.S.C.A. § 666(d). We do not reach this for Atlas was not penalized by either of these provisions and under no circumstances could we on this record and briefs which represent the finest in quality and content conclude or even sustain a post-affirmance effort by the Secretary to find this appeal to have been ill-founded, even if to the advocate remaining still unconvinced, the effort was unavailing in result. Atlas therefore simply has no standing to challenge these aspects of the statute. *Sierra Club v. Morton*, 1972, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636.

V. The Administrative Findings

Finally, Atlas challenges the administrative determination that at the time of the accident its roof hole coverings violated either the statute or the regulations. In the alternative Atlas contends: (i) that its means of hole covering complied with the intent of the statute which required that the coverings be ". . . so installed as to prevent accidental displacement";[61] (ii) the findings of the administrative hearing officer were not supported by substantial evidence; or (iii) even if the regulation was violated, no "serious" offense qualifying for civil penalties under 29 U.S.C.A. § 666(b) and (k) actually resulted from the means of hole coverings used.

[9] The ALJ determined that the opening covers used by Atlas—two bundles of insulation material of the same type then being laid over the roof by the Atlas employees—did not meet the requirements of the regulation that they be "so installed as to prevent accidental displacement." However, Atlas urges that the regulatory phrase was intended only to encompass an advertent dislodging of the cover—an assertedly unlikely possibility here—but not an inadvertent removal of unsecured insulation by an employee who thought it was merely one of the many bundles of insulation scattered over the solid roof deck. Reading the statute with its safety objectives in mind, we cannot accept any such distinction. The Administrative Agency had ample basis to conclude that Atlas' method of covering the roof openings fits well within the language of the regulation.

It was a jury-rigged system which failed with the price of a human life. We are not, nor would we wish to be, and our own system would suffer if we were, infused with "roofing prescience" to enable us to conclude, as Atlas urges, that the possible confusion by this temporary employee between these hole-covering bundles and those strewn around the roof deck was "accidental."

[10] Finally, the result—death—answers fully the contention that there was no "serious violation" of 29 C.F.R. § 1926.500(b)(1) committed resulting in a civil penalty under subds. (b) and (k) of 29 U.S.C.A. § 666. Atlas cites the exception to § 666(k) that excludes from a "serious violation" a situation where the employer "did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Essentially, this was a question of fact for which the administrative triers had ample basis to conclude that Atlas should have known of the presence of the violation.

Affirmed.

61. 29 C.F.R. § 1926.500(f)(5)(ii).

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-2249

OSCHRC No. 1130

ATLAS ROOFING COMPANY, INC.,
Petitioner,

versus

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, UNITED STATES DEPARTMENT OF LABOR
Respondent.

Petition for Review of an Order of the Occupational Safety and Health Review Commission (GEORGIA CASE)

Before BROWN, Chief Judge, and GODBOLD and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Atlas Roofing Company, Inc. for review of an order of the Occupational Safety and Health Review Commission, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review of an order of the Occupational Safety and Health Review Commission in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner pay to respondent, the costs on appeal to be taxed by the Clerk of this Court.

September 8, 1975

Issued as Mandate:

APPENDIX B

SECRETARY v. ATLAS ROOFING COMPANY

OSAHRC Docket No. 1130 May 7, 1973

BRADY, JUDGE, OSAHRC: This proceeding is brought pursuant to Section 10 of the Occupational Safety and Health Act of 1970, 29 USC 651 *et seq.* (hereinafter referred to as the Act) to contest a citation issued by the Secretary of Labor (hereinafter referred to as the Secretary) pursuant to Section 9(a) of the Act. The citation which was issued June 15, 1972, alleges that as the result of an inspection of the respondent's workplace at Jabco Warehouse No. 4, Granite Road, Arrowwood Industrial Park, Charlotte, North Carolina, respondent violated section 5(a)(2) of the Act by failing to comply with specific occupational safety and health standards promulgated by the Secretary pursuant to Section 6 thereof. A notice of proposed penalty was issued with the citation.

The Secretary alleges that on June 6, 1972, respondent violated the standard codified in 29 CFR 1926.500(b)(1). The hearing was held on November 2, 1972, in Charlotte, North Carolina, and no additional parties sought to intervene in the proceeding.

STATEMENT OF THE CASE

Atlas Roofing Co., Inc. is a corporation having a place of business at Moreland Avenue, No. 42 Highway, P.O. Box 18211, East Atlanta Station, Atlanta, Georgia, and is a business affecting commerce within the meaning of the Occupational Safety and Health Act of 1970 (Tr. 4).

On June 6, 1972, respondent was engaged in roofing the Jabco Warehouse No. 4, at Arrowwood Industrial Park, Charlotte, North Carolina. At the time and place in question, there were five employees of respondent, and six temporary employees hired through Help Unlimited to assist in the roofing operation, all of whom were under the supervision of respondent's foreman (Tr. 4-5).

In the process of roofing Bay No. 3 of Jabco Warehouse No. 4, a temporary employee fell through a roof opening to his death, approximately thirty feet below (Tr. 43) (Ex. 4).

ISSUES

The issues to be determined in this proceeding relate to whether the aforementioned standard has been violated. If such a violation has occurred, the question arises as to whether the violation was of a serious nature under the criterion of Section 17(k) of the Act. If respondent is adjudged in violation of the standard as alleged, then a determination must be made as to whether the penalty proposed is appropriate.

MOTIONS

The respondent moves to dismiss the Complaint and Citation for the following reasons.

(1) The Safety and Health Regulations for construction were improperly adopted by the Secretary.

(2) The complaint is not based upon a proper citation.

It is contended by respondent that the construction standards prescribed in 29 CFR Part 1926 (formerly 29

CFR Part 1518), and adopted by the Secretary as Occupational Safety and Health Standards pursuant to Section 6(a) of the Act, are invalid and therefore are of no force or effect in this proceeding. Respondent argues that although Section 6(a) allows the Secretary to promulgate "established Federal standards," such standards must have been in effect on the day of enactment of the Occupational Safety and Health Act.

The standards in question were established by the United States Department of Labor, and became effective April 24, 1971, prior to the effective date of the Occupational Safety and Health Act, but subsequent to its enactment. Section 3(10) of the Act defines the phrase "established federal standard" as meaning "any operative occupational safety and health standard established by an agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act."

In questioning the validity of the standards which form the basis of this proceeding, respondent places an erroneous interpretation on the phrase "presently in effect," as contained in section 3(10) of the Act. Although the phrase "presently in effect" is not defined in the Act, it must be construed to mean standards in force and effect on the effective date of the Act, April 28, 1971. Reading Section 3(10) in context with related sections of the Act, provides ample support for this view. Section 4(b)(2) provides "...Standards issued under the laws listed in this paragraph and in effect on or after the effective date of this Act shall be deemed to be Occupational Safety and Health Standards issued under this Act, as well as under such other Acts."

Accordingly, Section 4(b)(2) shows the Congressional intent that the effective date of the Act governs in determining whether Federal Standards are

"established" within the meaning of the Act. Also, in the latter part of Section 3(10) it is stated that standards in any act of Congress would be effective "on the date of enactment of this Act," distinguishing from those standards established by any agency of the United States "presently in effect." Further, Section 6(a) of the Act, which provides the statutory authority for the Secretary to promulgate standards, states that the Secretary may promulgate such standards commencing with the effective date of the Act.

Therefore, it would be a gross inconsistency to hold that the Secretary cannot promulgate standards "in effect" on the effective date of the Act, but require that such standards be in effect on the date of enactment of the Act only.

The Federal Standards in effect regarding construction were legally promulgated by the Secretary as Occupational Safety and Health Standards pursuant to Section 6(a) of the Act. Hence, the standards alleged to have been violated by the respondent were in effect on the date of the inspections herein.

After the Citation was issued, a Notice of Contest was duly filed initiating this proceeding. The Complaint was filed on July 17, 1972, and respondent's answer was filed July 24, 1972.

The Complaint alleged in part as follows:

"The Citation for Serious Violation, 29 CFR § 1926.500(b)(4), is hereby amended by changing 29 CFR §1926.500(b)(4) to 29 CFR §1926.500(b)(1) so that it is alleged on or about June 6, 1972, respondent violated 29 CFR §1926.500(b)(1) [formerly 29 CFR §1518.500(b)(1)]."

Respondent maintains that it is the citation issued by the Secretary that forms the basis of all legal proceedings against the employer before the Commission. It is asserted that the citation contains the

alleged violation to which the employer must file his notice of contest, and it is the citation which causes the employer to become liable for penalties under Section 17 of the Act. Further, under Section 10(c) of the Act, the Commission's final order is based upon the Secretary's citation which had been issued to the employer.

Thus, respondent contends that since the entire cause of action against the employer is the result of the citation, a complaint cannot be properly amended without the issuance of a new citation.

In response, complainant points out that the respondent denied all material allegations of the Complaint in its answer, and not until the day of the hearing approximately three months later, did respondent raise the question of the amendment. It is contended that the notice requirements of Section 9(a) of the Act do not impose such an inflexible burden on the Secretary, that a citation which gives fair notice of the nature and basis of the allegation, cannot be amended by substitution of regulation section numbers in the complaint.

A review of the evidence discloses that respondent was not prejudiced in defending this action by the amendment, and was not misled or surprised in any manner to its detriment. This is particularly true since the answer was timely filed and no question of the amendment was raised until the time of the hearing. On the face of the Complaint, it is obvious what the Secretary was undertaking to do, and the due process requirement of clear notice and opportunity to adequately defend, has certainly been met.

Therefore, the amendment was proper under the circumstances, and the Motion to Dismiss is denied.

ALLEGED VIOLATION OF 29 CFR 1926.500(b)(1)

Section 1926.500(b)(1) provides in pertinent part, as follows:

> Floor openings shall be guarded by a standard railing and toe boards or cover, as specified in paragraph (f) of this section. In general, the railing shall be provided on all exposed sides, except at entrances to stairways.

Complainant's witnesses testified that there were no guardrails used to guard the openings prior to the accident (Tr. 16). This testimony is not in dispute, and respondent's witness confirms that guardrails were first placed about the openings subsequent to the accident (Tr. 55).

There is uncontroverted testimony that the roof openings in question measured approximately three feet by three feet (Exh. 1) (Tr. 40). The testimony, however, is in conflict as to whether a roof opening in bay No. 3 was covered, on June 5, 1972, the date of the accident. Three witnesses for complainant testified that an opening was not covered (Tr. 13, 23, 29). The Compliance Officer testified that some of the persons he interviewed stated the openings were covered, some said they did not know, and some thought maybe they were, and some said they were not (Tr. 37).

The respondent's foreman testified that each opening was covered with two bundles of insulation that weighed approximately 60 pounds each, measured three feet by four feet in size, and that each one could support the weight of three men (Tr. 40) (Tr. 41). He further stated that after Mr. Bozeman (the deceased) had fallen through the opening he personally covered it with the insulation (Tr. 52).

It was also indicated that in the process of roofing, the bundles of insulation to be used for actual roofing purposes would be stacked four to five bundles high,

and approximately 10 to 15 feet apart. (Tr. 72) The foreman revealed that specific instructions were given to the temporary employees not to move the bundles of insulation over the openings while working on the roof (Tr. 42). Further, Mr. Bozeman was assigned to operate the hot machine, which was used to place hot tar upon the roof, and that his job had nothing to do with the insulation (Tr. 42).

In defense of the allegations by the complainant, respondent undertakes to show that the bundles of insulation described were sufficient to meet the Secretary's requirements for opening covers. However, Mr. John W. McMillan, Compliance Officer, for the Department of Labor testified that the bundles were about nine inches thick, and that "I wouldn't stand on one over those holes," in referring to a bundle of insulation (Tr. 36).

It is contended that if any covers were removed, it was the result of the deceased employee disregarding specific instructions against such removal. Respondent argues that under Section 17(k) of the Act, the employer cannot be cited for a serious violation if he did not or could not, with the exercise of reasonable diligence, have known about the presence of a violation.

As previously pointed out, the testimony is in direct conflict as to whether a roof opening was covered in bay No. 3. Under the circumstances perhaps complainant's witnesses had no specific occasion to observe over-head openings, however, there is no reason to doubt their testimony regarding light shining through the roof. Johnny Chambers testified that upon arriving at work in bay No. 3, he saw the sunlight through a roof opening and he stood in the sun a minute to warm up before starting work. This was at approximately 7:30 a.m. on the date of the accident herein (Tr. 29).

While the complainant maintains that the roof opening was not covered prior to the accident, it is admitted by respondent that the alleged covers were displaced at the time thereof.

Although the burden of proof rests with complainant in this proceeding, since it has been shown that guardrails and toeboards were not in use, it becomes incumbent upon respondent to establish that the use of opening covers is in compliance with the applicable standard.

Section 1926.500(b) does not specifically set forth that it has application to roofs, however, the general provision of the section, found in paragraph (a), contains reference to employees or materials falling through "roof" openings.

Paragraph (b) provides that covers for openings shall meet the specifications found in paragraph (f) of the Section. Paragraph (f)(5)(2) states in part as follows:

> The floor opening cover shall be capable of supporting the maximum intended load and so installed as to prevent accidental displacement.

The interpretation placed upon the foregoing requirement is determinative in resolving a key issue in this proceeding. In considering all of the factors in this case it must be held that even if the bundles of insulation were used for opening covers as alleged, the insulation failed to meet the requirement of "being so installed as to prevent accidental displacement."

The testimony shows that six temporary employees had been hired for the job who were without previous experience. They had been working approximately 3 hours prior to the accident herein. Further, in the process of roofing, the insulation which was used for insulating purposes, was taken from various bundles of the same type and description as insulation allegedly

used for opening covers. In fact, respondent's witness testified that bundles of insulation were "scattered all over the roof" (Tr. 42).

There is no question that an alleged cover was displaced at the time of the accident. Although the fact that the accident occurred does not necessarily mean that there was a violation, in this case it is noted that the employer retained full control over the conditions which gave rise to the violation.

Since, according to respondent, the alleged cover had been moved, there has been no showing as to how such cover was displaced nor when it was displaced. The standard does not specify the type of material required for an opening cover, but it is specific in that the cover must be so installed as to prevent accidental displacement.

It is abundantly clear from the facts that the described insulation used as alleged opening covers could have been accidentally displaced by an employee while acting free of fault or negligence, and in the performance of his duties. This is particularly true with reference to the temporary inexperienced employees, working amid stacks of insulation on the roof as described. It therefore cannot be held that under such circumstances bundles of insulation used as opening covers, would be so "installed" as to prevent accidental displacement. Respondent's argument that the alleged cover was removed as a result of an employee's misconduct is untenable. The facts do not bear out how such cover was removed, much less a showing of misconduct by an employee. Respondent has failed to meet the requirements of paragraph (f)(5)(2) because it has not been shown that if opening covers were used, they were installed in a manner as to prevent accidental displacement.

In view of the foregoing, and the fact that the

respondent did not use standard railing and toeboards, it is held that Section 1926.500(b)(1) was violated as alleged by complainant.

Appropriateness of Penalty

The authority to assess civil penalties under the Act resides exclusively with the Commission. The Commission, in Section 10(c) of the Act, is charged with affirming, modifying or vacating citations issued by the Secretary under Section 9(a), and notifications issued and penalties proposed by the Secretary under 10(a) and 10(b).

In determining the appropriate penalty, the Commission under Section 17(j) of the Act is expressly required to give "due consideration" to the size of the employer's business, the gravity of the violation, good faith of the employer, and history of previous violations, in determining the assessment of an appropriate penalty.

The Secretary's compliance officer testified that the factors considered before proposing the penalty in the amount of $600.00, was good faith, size, and history of previous violations. Commencing with $1,000, the amount of the penalty authorized under the Act for serious violations, a 10% reduction was allowed for good faith, as there was some safety awareness indicated but there wasn't a good safety program. Also, 10% was allowed for size as there was less than 19 employees, and 20% was allowed for history as there were no previous violations.

The record does not disclose what specific consideration was given to gravity of the violations by the Secretary. In *Nacirema Operating Company, Inc.*, OSHRC Docket No. 4, the Commission pointed out that the four criteria provided under Section 17(j)

cannot always be given equal weight, however it was indicated that the principal factor to be considered is the gravity of the offense. The Commission stated in *National Realty and Construction Co., Inc.* OSHRC Docket No. 85, that the elements to be considered in determining the gravity of a violation to be: (1) the number of employees exposed to the risk of injury; (2) the duration of the exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of an injury. Weighing all of these factors in light of the circumstances, it is concluded that the proposed penalty in the sum of $600.00 is appropriate and reasonable based on the facts of this record.

Motion to Supplement Record

At the conclusion of the hearing the record was closed but subject to being reopened on motion to receive testimony of one Erwin Griffin, a former temporary employee of respondent.

On December 26, 1972, respondent filed a Motion to Supplement Record. Respondent offered as evidence a copy of a purported statement dated June 7, 1972, of Erwin Griffin, and a copy of an Attending Physicians Report, before the North Carolina Industrial Commission, dated June 29, 1972.

Complainant objects to the admissibility of the documents as they are not shown to be newly discovered, and constitute inadmissible heresay statements.

The documents offered as evidence in this proceeding are unauthenticated copies, which could not be held as admissible evidence in the ordinary course of the hearing. It is indicated that upon diligent search the evidence was discoverable by respondent

prior to the hearing, and thus would have afforded complainant an opportunity for cross-examination.

The documents offered by respondent have not been shown to be credible and must be held inadmissible as violative of Rule 72 of the Commission's Rules.

Findings of Fact

1. Atlas Roofing Company, Inc., is a corporation doing business at Moreland Avenue, #42 Highway, Atlanta, Georgia, where it is engaged in the business of roofing construction.

2. On June 6, 1972, respondent was engaged in the roofing of Jabco Warehouse No. 4 at Arrowwood Industrial Park, Charlotte, North Carolina.

3. On June 8, 1972, an authorized representative of the Secretary conducted an inspection of the above worksite at Arrowwood Industrial Park, Charlotte, North Carolina. As a result of the inspection, on June 15, 1972, a citation for an alleged serious violation was issued, with notice of proposed penalty.

4. On June 6, 1972, there were five regular employees and six temporary employees of respondent working on the roof of bay No. 3 at Jabco Warehouse No. 4 as aforementioned.

5. In process of roofing bay No. 3, roof openings were not guarded by standard railing and toeboards prior to the accident on June 6, 1972.

6. On June 6, 1972, a roof opening over bay No. 3 was not covered.

7. On June 6, 1972 there was substantial probability that death or serious physical harm could result to respondent's employees working on the roof under the aforesaid conditions.

8. The proposed penalty issued herein was

determined in accordance with the administrative guidelines of the Secretary and is found to be reasonable and appropriate.

CONCLUSIONS OF LAW

1. Atlas Roofing Company, Inc., at all times pertinent hereto, was an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act of 1970, and the Commission has jurisdiction of the parties and subject matter herein, pursuant to 10(c) of the Act.

2. Respondent is, and at all times pertinent hereto, required to comply with safety and health regulations promulgated by the Secretary pursuant to Section 6(a) of the Act.

3. Respondent was in violation of 29 CFR 1926.500(b)(1) on June 6, 1972, as charged in the amended citation. The violation constituted a serious violation within the meaning of Section 17(k) of the Act.

4. A penalty of $600.00 is assessed for the serious violation contained in the amended citation.

5. Respondent failed to comply with the regulations set forth above which is contained in the amended citation, thereby violating Section 5(a)(2) of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record it is

ORDERED

1. That the amended citation and proposed penalty for violation of 29 CFR 1926.500(b)(1) is affirmed and a penalty in the amount of $600.00 is assessed. □

JOINT APPENDIX

Supreme Court, U. S.
FILED
JUN 18 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-748

FRANK IREY, JR., INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION, AND
JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

No. 75-746

ATLAS ROOFING COMPANY, INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION AND
JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

On Writs of Certiorari to
The United States Courts of Appeals
For the Third and Fifth Circuits

Petitions for Certiorari Filed November 21, 1975
Certiorari Granted March 22, 1976

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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JOINT APPENDIX

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*The majority and dissenting opinions and judgment of the Court of Appeals for the Third Circuit *en banc* in No. 75-746 are printed at pp. 1a-25a of the Petition for Certiorari. The majority and dissenting opinions of the panel of the Third Circuit in No. 75-746 are printed at pp. 1b-26b of the Appendix to the Petition for Certiorari. The opinion of the United States Court of Appeals for the Fifth Circuit in No. 75-748 is printed at pp. 1a-27a of the Appendix to the Petition for Certiorari in that case. The orders and opinions of the Occupational Safety and Health Review Commission in each case are reprinted as appendices to the respective petitions for certiorari in each case.

CHRONOLOGICAL LIST OF RELEVANT DOCKET FNTRIFS DOCKET NUMBER 75-746

6/15/72	Secretary's citation for serious violation, issued
6/15/72	Secretary's notification of proposed penalty, dated
7/10/72	Employer's notice of contest, received
7/17/72	Secretary's complaint, received
7/24/72	Employer's answer to complaint, received
8/30/73	Employer's demand for jury trial and procedural due process, dated
8/30/72	Employer's motion to dismiss, dated
9/7/72	Hearing Judge Brady's Order denying demand for jury trial and motion to dismiss, dated
11/2/72	Hearing opened
11/2/72	Hearing closed
4/5/73	Hearing Judge Brady's decision, received
4/30/73	Employer's petition for discretionary review, received
5/8/73	Commission final order, dated
6/4/73	Petition for Review of the Order of the Occupational Safety and Health Review Commission, filed in Court of Appeals for the Fifth Circuit, filed
9/8/75	Opinion and Judgment of the Court of Appeals, filed

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES DOCKET NO. 75-748

3/22/72	Secretary's Citation for serious violation, issued
3/22/72	Secretary's Notification of proposed penalties, dated
3/28/72	Employer's Notice of Contest, dated
4/12/72	Secretary's Complaint, received
4/14/72	Employer's Answer, dated
6/12/72	Hearing opened
6/17/72	Oral Motion to Dismiss for unconstitutionality of enforcement procedures
6/27/72	Hearing closed
11/13/72	Administrative Law Judge's Decision & Order, dated
12/14/72	Chairman Moran's Direction for Review, dated
8/1/73	Commission's Decision, dated
9/7/73	Petition for Review of Order of the Occupational Safety and Health Review Commission, filed in Court of Appeals for Third Circuit
9/28/73	Amended Petition for Review to include United States Dept. of Labor as additional Respondent, filed
11/4/74	Opinion and Judgment of the Court of Appeals, filed
12/20/74	Order granting Petition for Rehearing and directing the Clerk to list case for rehearing before the Court en banc, filed
7/24/75	Opinion and Judgment of the Court of Appeals on Rehearing, filed

March 29, 1976

Mr. Ken Geller
Office of the Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Re: Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Commission, et al.; No. 75-748; Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission, et al.; No. 75-746

Dear Mr. Geller:

In accordance with our recent telephone conversation and Supreme Court Rule 36, the Petitioners in the above styled consolidated cases designate, in addition to the documents printed as an appendix to their respective Petitions for Certiorari, the following for inclusion in the single joint appendix:

1. Certified list of relevant docket entries (Docket No. 75-748);

2. Citation for serious violation, dated March 22, 1972 (Docket No. 75-748);

3. Complaint, received April 12, 1972 (Docket No. 75-748);

4. Employer's Answer, dated April 14, 1972 (Docket No. 75-748);

5. United States Supreme Court Order granting Petition for Certiorari, dated March 22, 1976 (Docket No. 75-748);

6. Certified list of relevant docket entries (Docket No. 75-746);

7. Citation for serious violation, dated June 15, 1972 (Docket No. 75-746);

8. Complaint, received July 17, 1972 (Docket No. 75-746);

9. Employer's Answer, dated July 20, 1972 (Docket No. 75-746);

10. United States Supreme Court Order granting Petition for Certiorari, dated March 22, 1976 (Docket No. 75-746).

The issue which Petitioners intend to present for review in these consolidated cases is question No. 2 in the Petition for Certiorari, as follows:

> Assuming that the administrative enforcement procedures set up by the Occupational Safety and Health Act of 1970 for the imposition of civil penalties are civil in nature and effect, whether such procedures deny the defendant employers' right to jury trial guaranteed by the Seventh Amendment to the Constitution.

Your response to this designation as soon as possible will be appreciated.

Very truly yours,

STOKES & SHAPIRO

Ira J. Smotherman, Jr.
for McNeill Stokes

IJS,Jr/pc

cc: Mr. Michael Levin
Mr. Michael Rodak, Jr.
Mr. William S. McLaughlin
Mr. Martin D. Minsker
Mr. Oliver N. Hormel

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration
1000 Liberty Avenue, Room 445D
Pittsburgh, Pa. 15222

Secretary's Citation for Alleged Serious Violation, Dated March 22, 1972.

CSHO NO.	OSHA I NO.
0-9819	4
AREA	REGION
6600	3

CITATION FOR SERIOUS VIOLATION*

Citation Number 1 Date Issued March 22, 1972

EMPLOYER Frank Irey Jr., Inc.

ADDRESS (Street Park Avenue Extension, R. D. #2

(City Monongahela State Pennsylvania Zip 15063

An inspection of a workplace under your ownership, operation, or control located at Evansdale Campus, West Virginia University, Morgantown, West Virginia and described as follows Station 8 + 00 Main Guide Creative Arts and Engineering Building has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
29 C.F.R. Section 1926.652(b) (formerly 29 C.F.R. Section 1518.652(b)), as adopted by 29 C.F.R. Section 1910.12	On January 11, 1972, at the above work site, Frank Irey Jr., Inc. willfully violated the aforesaid standard by failing to shore, sheet, brace, slope or otherwise support by means of sufficient strength to protect employees working within them, the sides of a trench approximately 3 feet wide, 35 feet long and 7½ feet deep.	Immediately

Area Director's Signature Harry G. Jacobs

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U. S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that no penalty is being proposed.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occurred." It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.

* A serious violation, according to the Act "shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Sec. 17(k).

Form OSHA-
AUG. 1971

BEST COPY AVAILABLE

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7a

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration
1000 Liberty Avenue, Room 445D
Pittsburgh, Pa. 15222

CSHO NO.	OSHA NO.
0-9819	4
AREA	REGION
6600	3

CITATION FOR SERIOUS VIOLATION*

Citation Number 2 Date Issued March 22, 1972

EMPLOYER Frank Irey Jr., Inc.

ADDRESS (Street Park Avenue Extension, R. D. #2

(City Monongahela State Pennsylvania Zip 15063

An inspection of a workplace under your ownership, operation, or control located at Evansdale Campus, West Virginia University, Morgantown, West Virginia and described as follows Station 8 + 00 Main Guide Creative Arts and Engineering Building has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
29 C.F.R. Section 1926.651(h) and 29 C.F.R. Section 1926.652 (h) (formerly 29 C.F.R. Section 1518.651(h) and 29 C.F.R. Section 1518.652(h)), as adopted by 29 C.F.R. 1910.12	On January 11, 1972, at the above work site, Frank Irey Jr., Inc. stored excavated material nearer than 4 feet from the edge of a trench excavation (excavated material was piled immediately adjacent to trench); no ladder was provided in trench more than 3 feet deep, where employees were required to be in trench (trench was approximately 3 feet wide, 35 feet long and 7½ feet deep).	Immediately

Area Director's Signature Harry G. Lacy JKES

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that no penalty is being proposed.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occurred." It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.

* A serious violation, according to the Act "shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Sec. 17(k).

Form OSHA 2

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration
Secretary's Notification of Proposed Penalty,
Dated March 22, 1972.
NOTIFICATION OF PROPOSED PENALTY

CSHO NO.	OSHA I NO.
0-9919	4
AREA	REGION
6600	3

TO: Frank Irey Jr., Inc.
Park Avenue Extension, R. D. #2
Monongahela, Pennsylvania 15063

On the 22nd day of March, 1972, 1 Citation(s) /~~1~~/ (were) issued to you in accordance with the provisions of section 9(a) of the Occupational Safety and Health Act of 1970 (84 Stat. 91; 29 U.S.C. 651, et seq.) hereinafter referred to as the Act. You were thus notified of certain alleged violations of the Act, as specified in that Citation(s).

YOU ARE HEREBY NOTIFIED that pursuant to the provisions of section 10(a) of the Act, the penalty(ies) set forth below /~~#~~/ are being proposed, based on the above Citation(s):

SERIOUS VIOLATIONS

Citation No.		Proposed Penalty
1.	29 C.F.R. 1926.652(b)	$7,500.00
2.	29 C.F.R. 1926.651(h)	$ 800.00

OTHER VIOLATIONS*

Citation No.	Item No.		Proposed Penalty
1	1.	29 C.F.R. 1926.401(f)	$ 80.00
1	2.	29 C.F.R. 1926.150(c)(1)(vii)	0
1	3.	29 C.F.R. 1926.350(a)(1)	$ 45.00
1	4.	29 C.F.R. 1926.51(c)	$ 55.00
1	5.	29 C.F.R. 1926.51(a)(1)	$ 55.00

Total for All Alleged Violations $8,535.00

* In the case of each "other violation," the proposed penalty reflects a 50 percent adjustment factor for corrective action taken within the period prescribed in the citation. If a particular alleged violation is not corrected within this period, an automatic additional penalty of 50 percent will be proposed for each violation. However, if you contest an alleged violation in good faith before the Review Commission, the period for correction does not begin to run until the entry of a final order by the Review Commission affirming the citation. The proposed penalty is exclusive of such other additional penalty as may subsequently be proposed for failure to correct a violation within the abatement period.

(Continued on reverse side)

Form OSHA-3

BEST COPY AVAILABLE

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The payment of penalties is to be made by certified check or money order, payable to the order of "Occupational Safety and Health-Labor." Remit to the Area Director whose address appears below.

YOU ARE FURTHER NOTIFIED that the aforesaid Citation(s), this Notification, and the proposed assessment shall be deemed to be the final order of the Occupational Safety and Health Review Commission and not subject to review by any court or agency, unless, within 15 working days from the date of receipt of this notice, you notify the official named below in writing that you intend to contest the Citation or this Notification of Proposed Penalty before the Review Commission. The Review Commission is an independent quasi-judicial agency with authority to issue decisions regarding citations and proposed penalties.

There is no requirement that this Notification be posted.

Dated at Pittsburgh, Pennsylvania this 22nd day of March, 19 72.

Harry G. Lacey Jr.

Area Director
Occupational Safety and Health Administration
U.S. Department of Labor
1000 Liberty Avenue, Room 445D Federal Bldg.
Pittsburgh, Pennsylvania 15222

BEST COPY AVAILABLE

GPO 810-616

Form OSHA-3
Aug. 1971

Secretary's Complaint, Received April 12, 1972.

COMPLAINT.

Petitioner, James D. Hodgson, Secretary of Labor, United States Department of Labor, brings this proceeding to enforce the provisions of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U. S. C. 651, *et seq.*), hereinafter referred to as the Act, seeking to have affirmed by the Occupational Safety and Health Review Commission, certain Citations and Proposed Penalties assessed against the respondent, Frank Irey, Jr., Inc., a corporation, for alleged violations of section 5(a) (2) of the Act, and the Safety and Health Regulations for construction promulgated thereunder, as found in 29 C. F. R. 1518 and adopted pursuant to section 4(b) (2) of the Act by regulations issued thereunder, as found in 29 C. F. R. 1910.12 as Safety and Health Regulations under the Act and redesignated as Part 1926.

I.

Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by section 10(c) (29 U. S. C. 661(c)) of the Act.

II.

Respondent, Frank Irey, Jr., Inc., is a Pennsylvania corporation maintaining its principal office at Park Avenue Extension, R. D. No. 2, Monongahela, Pennsylvania, and also maintaining a work site at R. D. No. 2, Box 7, Evansdale Campus, West Virginia University, Morgantown, West Virginia, and is and at all times hereinafter mentioned was, a general contractor engaged in various construction activities both in the Commonwealth of Pennsylvania and in the state of West Virginia, and is an employer engaged in a business af-

fecting commerce who has employees as defined by section 3(5) of the Act and is subject to the requirements of the Act and the regulations issued or promulgated thereunder.

III.

An inspection of the respondent's work place, a site for excavation located at the Evansdale Campus, West Virginia University, Morgantown, West Virginia, Station 8+ 00, Main Guide Creative Arts & Engineering Building, was conducted by Compliance Safety and Health Officers of the Occupational Safety and Health Administration, Pittsburgh Area, on January 14, 1972. As a result of this investigation, the respondent was issued by certified mail on March 22, 1972, one Citation for Serious Violation (Willful), one Citation for Serious Violation, and one Citation containing five items, all of which were issued pursuant to section 9(a) of the Act.

To the extent that this Complaint is, or may be inconsistent with the aforesaid Citations and penalties proposed thereon, the said Citations and Proposed Penalties should be deemed to be amended accordingly.

IV.

Citation for Serious Violation (Willful)

On January 11, 1972, respondent willfully violated 29 C. F. R. 1926.652(b) by failing to shore, sheet, brace, slope or otherwise support by means of sufficient strength, the sides of a trench located at the aforementioned work site. An immediate abatement date was fixed, and pursuant to section 17(a) of the Act, a penalty of $7,500 was proposed.

Citation for Serious Violation

a. On January 11, 1972, respondent violated 29 C. F. R. 1926.651(h) which requires that excavated or other material

shall not be stored nearer than four feet from the edge of any excavation, and shall be so stored and retained as to prevent its falling or sliding in to the excavation. This standard was violated in that respondent stored excavated material nearer than 4 feet from the edge of the aforesaid trench excavation.

b. On January 11, 1972 respondent violated 29 C. F. R. 1926.652(h) which requires that where employees are required to be in trenches three feet deep or more, ladders extending from the floor of the trench excavation to at least three feet above the top of the excavation shall be provided and so located as to provide means of exit without more than 25' of lateral travel. This standard was violated in that no ladder was provided in the aforesaid trench although the said trench was more than 3 feet deep and employees were required to be in the said trench.

An immediate abatement date was fixed for items a and b above, and a penalty of $800 was proposed pursuant to section 17(b) of the Act.

Citation

a. Item No. 1—On January 11, 1972 respondent violated 29 C. F. R. 1926.401(f) which requires that extension cords used with portable electric tools and appliances shall be of the three wire type. This standard was violated in that an extension cord used with a fuel tank pump was not of the three wire type. An abatement date of March 27, 1972 was fixed, and pursuant to section 17(c) of the Act, a penalty of $80 was proposed.

b. Item No. 2—On January 11, 1972 respondent violated 29 C. F. R. 1926.150(c)(1)(vii) which requires that portable fire extinguishers shall be inspected periodically and maintained in accordance with Maintenance and Use of Portable

Fire Extinguishers NFPA No. 10-A-70. This standard was violated in that a fire extinguisher in the oil storage and equipment trailer had no maintenance record tag or record of inspection. An abatement date of March 27, 1972 was fixed and no penalty was proposed.

c. Item No. 3—On January 11, 1972 respondent violated 29 C. F. R. 1926.350(a)(1) which requires that when transporting, moving and storing compressed gas cylinders, valve protection caps shall be in place and secured. This standard was violated in that several gas cylinders in the cylinder storage area had no valve protection caps in place. An immediate abatement date was fixed and pursuant to section 17(c) of the Act, a penalty of $45 was proposed.

d. Item No. 4—On January 11, 1972 respondent violated 29 C. F. R. 1926.51(c) which requires that toilets shall be provided for employees. This standard was violated in that no toilets were provided. An abatement date of March 29, 1972 was fixed and pursuant to section 17(c) of the Act, a penalty of $55 was proposed.

e. Item No. 5—On January 11, 1972 respondent violated 29 C. F. R. 1926.51(a)(1) which requires that an adequate supply of potable water shall be provided in all places of employment. This standard was violated in that no potable water was provided at the place of employment. An abatement date of March 27, 1972 was fixed and pursuant to section 17(c) of the Act, a penalty of $55 was proposed.

Secretary's Complaint, Received April 12, 1972.

V.

The proposed penalties and abatement dates as previously mentioned herein were reasonable and proper in that due consideration was given to the gravity of the violations, the size of the respondent, the good faith of the respondent and its history of previous violations as required by section 17(j) of the Act.

VI.

Respondent by letter dated March 28, 1972, signed by Paul A. Simmons, Esquire, counsel for the respondent, notified the petitioner of its intention to contest the citations and penalties. Said notice was received by the Area Director, Pittsburgh, Occupational Safety and Health Administration on March 31, 1972. The notice of contest was forwarded to the Occupational Safety and Health Review Commission on March 31, 1972.

VII.

Respondent employs approximately 100 employees, and those employees at the work site affected by the aforesaid violations are represented by District 50, Allied Technical Workers of the United States and Canada, 4880 McArthur Blvd., N. W., Washington, D. C.

WHEREFORE, cause having been shown, petitioner demands that the aforesaid Citations be affirmed and that the Commission affirm the aforesaid penalties or in the alternative, assess penalties for the aforesaid violations in an amount not less than that proposed by the Area Director,

Secretary's Complaint, Received April 12, 1972.

Pittsburgh Area Office, Occupational Safety and Health Administration.

Post Office Address:

Mr. Louis Weiner
U. S. Department of Labor
1505 Jefferson Bldg.
1015 Chestnut St.
Phila., Pa. 19107

RICHARD F. SCHUBERT,
Solicitor of Labor.

LOUIS WEINER,
Regional Solicitor.

STEPHEN K. ERNST,
Attorney.

UNITED STATES DEPARTMENT
OF LABOR,
Attorneys for Petitioner.

MARVIN TINCHER,
Regional Attorney,
Nashville, Tennessee,
Region X.

CERTIFICATE OF SERVICE.

I, Stephen K. Ernst, hereby certify that I served a Complaint, by mailing true copies thereof in Government en-

Secretary's Complaint, Received April 12, 1972.

velopes, postage prepaid, by certified mail, return receipt requested on the below:

Certified No. 672287
Frank Irey, Jr., Inc.
Park Avenue Extension
R. D. No. 2
Monongahela, Pa. 15063

Certified No. 672288
Paul A. Simons, Esq.
Hormell, Tempest, Simmons,
Bigi & Melenyzer
Second & Chess Streets
Monongahela, Pa. 15063

Certified No. 672289
Pres. District 50
Allied Technical Workers
of the U. S. & Canada
4880 McArthur Blvd., N. W.
Washington, D. C. 20007

Certified No. 672290
Miss Carole A. Betterley
Executive Secretary
Occupational Safety and Health
Review Commission
1825 K. Street, N. W.
Washington, D. C. 20006

STEPHEN K. ERNST,
United States Department of Labor
One of the Attorneys for Petitioner.

Employer's Answer, Dated April 14, 1972.

ANSWER TO COMPLAINT.

Respondent, Frank Irey, Jr., Inc., answers to Complaint in the above captioned case as follows:

1. Paragraph number one of said Complaint is admitted.

2. Paragraph number two of said Complaint is admitted.

3. Paragraph number three of said Complaint is admitted, but it is denied that any of the citations referred therein were wilful, and/or serious.

Employer's Answer, Dated April 14, 1972.

4. (Citation for Serious Violation (Wilful)) The first sentence of Paragraph Number four of said Complaint is denied that on January 11, 1972, Respondent wilfully violated 29 C. F. R. 1926.652 (b) by failing to shore, sheet, brace, slope or otherwise support by means of sufficient strength, the sides of a trench located at the aforementioned work site. As to the second sentence in Paragraph Number four of said Complaint, the same is admitted.

4a. (Citation for Serious Violation) As to Paragraph 4a. of said Complaint, it is denied that on January 11, 1972, Respondent violated 29 C. F. R. 1926. 651(h), and on the contrary, it is averred that all excavated material and other material was properly stored.

4b. As to Paragraph 4b. of said Complaint, it is denied that on January 11, 1972, Respondent violated 29 C. F. R. 1926.652(h), and on the contrary it is averred that all standards required by law were not violated.

4. (Citation) (Page No. 4 of Complaint)

a. In answer to a. Item No. 1, it is denied that on January 11, 1972, Respondent violated 29 C. F. R. 126.401(f), and further, it is denied that the extension cords referred to in said paragraph was not in the proper type.

b. In answer to b. Item No. 2, it is denied that on January 11, 1972, Respondent violated 29 C. F. R. 1926 C. F. R. 1926.150(c) (1) (vii), and on the contrary it is averred that portable fire extinguishers were inspected and maintained in accordance with the proper standards.

c. In answer to c. Item No. 3, it is denied that on January 11, 1972, Respondent violated 29 C. F. R. 1926.350(a) (1), and on the contrary it is averred that proper valve protection caps were on all compressed gas cylinders when the same were transported and/or moved or stored.

Employer's Answer, Dated April 14, 1972.

d. In answer to d. Item No. 4, it is denied that on January 11, 1972, respondent violated 29 C. F. R. 1926.51(c), and on the contrary it is averred that proper toilets were provided.

e. In answer to e. Item No. 5, it is denied that on January 11, 1972, Respondent violated 29 C. F. R. 1926.51(a) (1), and on the contrary it is averred that an adequate supply of water was provided at the place of employment.

5. Paragraph Number five of said Complaint is denied that the proposed penalties and abatement dates as previously mentioned herein were reasonable and proper in that due consideration was given to the gravity of the violations, the size of the respondent, the good faith of the respondent and its history of previous violations as required by Section 17(j) of the act, and on the contrary, the proposed penalties under all of the circumstances were unreasonable and improper.

6. Paragraph Number six of said Complaint is admitted.

7. Paragraph Number seven of said Complaint is admitted.

WHEREFORE, Respondent demands that the aforesaid Citations be dismissed, and in the alternative, that the penalties assessed should be substantially reduced under the circumstances.

HORMELL, TEMPEST, SIMMONS,
BIGI & MELENYZER,
By Paul A. Simmons,
Attorney for Frank Irey, Jr.,
Inc., Respondent.

20a

Employer's Answer, Dated April 14, 1972.

CERTIFICATE OF SERVICE.

I, PAUL A. SIMMONS, hereby certify that I have served Answers to the Complaint, by mailing true copies thereof, postage prepaid, by certified mail, return receipt requested on the below:

Pres. District 50
Allied Technical Workers
of the U. S. & Canada
4880 McArthur Bldg., N. W.
Washington, D. C. 20007
Certified No. 754008

Marvin Tincher
Regional Attorney
725 U. S. Courthouse
801 Broadway
Nashville, Tennessee 37203
Certified No. 705284

PAUL A. SIMMONS,
Attorney for Frank Irey, Jr., Inc., Respondent.

Sworn to and subscribed before
me this 14th day of April, 1972.
Carmen M. DiGiovanni,
Notary Public,
Monongahela, Washington Co.,
My Commission Expires July 7, 1975.

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U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

CSHO NO.	CASE NO.
M-8790	72-7
AREA	REGION
0870	4

CITATION FOR SERIOUS VIOLATION*

Citation Number One, Page 1 of 1 Date Issued June 15, 1972

EMPLOYER Atlas Roofing Company, Inc.

ADDRESS (Street Moreland Avenue, #42 Highway
P.O. Box 18211, E. Atlanta Station
(City Atlanta State Georgia Zip 30316

An inspection of a workplace under your ownership, operation, or control located at Granite Road, Arrowood Industrial Park, Charlotte, North Carolina and described as follows Construction project Jabco #4 warehouse has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
29 CFR Sec 1926.500(b)(4) (formerly 29 CFR Sec 1518.500(b)(4) as adopted by 29 CFR Sec 1910.12.	Failure to provide and maintain a cover, or to provide a fixed standard railing on all exposed sides, for openings in roof, as the 3' x 3' opening in #3 bay of Jabco Warehouse #4.	Immediately

The above condition existed on June 6, 1972.

Area Director's Signature Preston F. Hawkins

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U. S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that no penalty is being proposed.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occurred." It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.

* A serious violation, according to the Act "shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Sec. 17(k).

26a

27a

U... DEPARTMENT OF LABOR
Occupational Safety and Health Administration

CSHO NO.	OSHA-1 NO.
M-8799	72-7
AREA	REGION
0870	4

NOTIFICATION OF PROPOSED PENALTY

TO: Atlas Roofing Company, Inc.
P.O. Box 18211, E. Atlanta Station
Atlanta, Georgia 30316

On the Fifteenth day of June, 1972, a Citation(s) was (were) issued to you in accordance with the provisions of section 9(a) of the Occupational Safety and Health Act of 1970 (84 Stat. 1601; 29 U.S.C. 651, et seq.) hereinafter referred to as the Act. You were thus notified of certain alleged violations of the Act, as specified in that Citation(s).

YOU ARE HEREBY NOTIFIED that pursuant to the provisions of section 10(a) of the Act, the penalty(ies) set forth below is/are being proposed, based on the above Citation(s):

SERIOUS VIOLATIONS

Citation No.	Proposed Penalty
ONE	$600

28a

OTHER VIOLATIONS*

Citation No.	Item No.	Proposed Penalty
		NONE

29a

Total for All Alleged Violations $600

* In the case of each "other violation," the proposed penalty reflects a 50 percent adjustment factor for corrective action taken within the period prescribed in the citation. If a particular alleged violation is not corrected within this period, an automatic additional penalty of 50 percent will be proposed for each violation. However, if you contest an alleged violation in good faith before the Review Commission, the period for correction does not begin to run until the entry of a final order by the Review Commission affirming the citation. The proposed penalty is exclusive of such other additional penalty as may subsequently be proposed for failure to correct a violation within the abatement period.

(Continued on reverse)

The payment of penalties is to be made by certified check or money order, payable to the order of "Occupational Safety and Health-Labor." Remit to the Area Director whose address appears below.

YOU ARE FURTHER NOTIFIED that the aforesaid Citation(s), this Notification, and the proposed assessment shall be deemed to be the final order of the Occupational Safety and Health Review Commission and not subject to review by any court or agency, unless, within 15 working days from the date of receipt of this notice, you notify the official named below in writing that you intend to contest the Citation or this Notification of Proposed Penalty before the Review Commission. The Review Commission is an independent quasi-judicial agency with authority to issue decisions regarding citations and proposed penalties.

There is no requirement that this Notification be posted.

Dated at CHARLOTTE, NORTH CAROLINA this FIFTEENTH day of JUNE, 1972.

QUINTON F. HASKINS

Area Director
Occupational Safety and Health Administration
U.S. Department of Labor
1361 E. Morehead Street
Charlotte, North Carolina 28204

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,	)	
	)	OSHRC Docket
v.	)	No. 1130
ATLAS ROOFING COMPANY, INC.	)	
Respondent.	)	**COMPLAINT**

Inspection has disclosed that, at the times and in the manner hereinafter stated, the provisions of section 5(a)(2) of the Occupational Safety and Health Act of 1970 (84 Stat. 1604; 29 U.S.C. 651, *et seq.*), hereinafter referred to as the Act, and Occupational Safety and Health Standards promulgated pursuant to section 6 thereof (29 CFR Part 1910) have been violated. It is, therefore, averred and charged that:

I

Jurisdiction of this proceeding is conferred upon the Commission by section 10(c) of the Act.

II

Respondent, Atlas Roofing Company, Inc., is a corporation having a place of business and doing business at Moreland Avenue, #42 Highway and various

construction sites where it is engaged in roofing construction. Respondent is and at all times hereinafter mentioned has been an employer engaged in a business affecting commerce within the meaning of the Act.

III

As a result of inspection by an authorized representative of the Secretary of Labor, one citation was issued to respondent on June 15, 1972, pursuant to section 9(a) of the Act.

To the extent that this complaint may be inconsistent with the citation and proposed penalty issued in this proceeding, the citation and proposed penalty are deemed to be amended accordingly.

IV

The Citation for Serious Violation, 29 CFR § 1926.500(b)(4), is hereby amended by changing 29 CFR § 1926.500(b)(4) to 29 CFR § 1926.500(b)(1) so that it is alleged on or about June 6, 1972, respondent violated 29 CFR § 1926.500(b)(1) [formerly 29 CFR § 1518.500(b)(1)] in that respondent failed to provide and maintain a cover or to provide a standard railing on all exposed sides for openings in the roof at #3 bay of Jabco Warehouse #4 under construction at Arrowood Industrial Park, Charlotte, North Carolina.

V

The violation alleged in paragraph IV above was a serious violation within the meaning of section 17(k) of

the Act in that there was a substantial probability that death or serious physical harm could result from the condition alleged to exist, and respondent knew, or could with the exercise of reasonable diligence have known, of the presence of the violation.

VI

On June 15, 1972, notification fixing an abatement date and proposed penalty was mailed to respondent. The abatement date fixed and penalty proposed with respect to the violation alleged in paragraph IV above are Immediately and $600.00, respectively. The aforesaid abatement date was and is reasonable. In determining the amount of the proposed penalty, due consideration was given to the size of the business of the respondent, the gravity of the violation, the good faith of the employer and the history of previous violations as required under section 17(j) of the Act.

VII

On or about July 7, 1972, by letter dated July 5, 1972, respondent filed with the Secretary a notification of intent to contest the aforesaid citation and proposed assessment of penalty pursuant to the provisions of section 10(c) of the Act. Said notification of intent to contest was duly transmitted to the Occupational Safety and Health Review Commission.

VIII

(A) Employees of respondent affected by the violation described in paragraph IV above number

approximately seven (7) and include roofers and laborers.

(B) Said employees are not represented by a certified bargaining representative.

WHEREFORE, the aforesaid citation, penalty and abatement date should be affirmed.

POST OFFICE ADDRESS:

Mr. Beverley R. Worrell
Office of the Solicitor
U.S. Department of Labor
Room 339
1371 Peachtree St., N.E.
Atlanta, Georgia 30309

Telephone: 404-526-5811

/s/ Richard F. Schubert
Richard F. Schubert
Solicitor of Labor
/s/ Beverley R. Worrell
Beverley R. Worrell
Regional Solicitor

/s/ Joan M. Hollenbach
Joan M. Hollenbach
Attorney

/s/ Roger J. Martinson
Roger J. Martinson
Attorney

Attorneys for James D. Hodgson, Secretary of Labor, United States Department of Labor.

OCCUPATIONAL SAFETY & HEALTH
REVIEW COMMISSION
RECEIVED
JUL 17 1972
Office of the Executive Secretary

CERTIFICATE OF SERVICE

I certify that the foregoing complaint was served on this 14th day of July, 1972, by mailing true copies thereof by certified mail, return receipt requested, to Mr. McNeill Stokes, Attorney for Respondent, at 3015 First National Bank Tower, Atlanta, Georgia 30303.

/s/ Roger J. Martinson
Roger J. Martinson
Attorney

OCCUPATIONAL SAFETY & HEALTH
REVIEW COMMISSION
RECEIVED
JUL 17 1972
Office of the Executive Secretary

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,	)	
v.	)	OSHRC Docket No. 1130
ATLAS ROOFING COMPANY, INC.,	)	
Respondent,	)	**ANSWER**

Comes now ATLAS ROOFING COMPANY, INC., hereinafter sometimes referred to as "Atlas", and files this Answer without waiving its jurisdictional defenses, hereinafter set forth, as follows:

FIRST DEFENSE

1.

The allegation of paragraph I of the Complaint is denied.

2.

The allegations of paragraph II are denied, except that the Respondent, Atlas, is a corporation having a place of business and doing business at Moreland Avenue, #42 Highway and various construction sites where it is engaged in roofing construction.

3.

The allegations of paragraph III are denied, except that one citation was issued to Respondent, Atlas, on June 15, 1972.

4.

The allegations of paragraph IV are denied.

5.

The allegations of paragraph V are denied.

6.

The allegations of paragraph VI are denied, except that on June 15, 1972, notification fixing an abatement date and proposed penalty was mailed to Respondent.

7.

The allegations of paragraph VII are admitted.

8.

The allegations of paragraph VIII(A) are denied.

9.

The allegation of paragraph VIII(B) is admitted.

SECOND DEFENSE

The Respondent is not subject to the jurisdiction of the Occupational Safety and Health Review Commission or the provisions of the Occupational Safety and Health Act of 1970.

THIRD DEFENSE

The Occupational Safety and Health Act of 1970, and its enforcement procedures are invalid and unconstitutional.

FOURTH DEFENSE

The standards alleged to have been violated are invalid and did not apply to work performed on roofing and did not apply to the Respondent.

FIFTH DEFENSE

The Complaint fails to state a cause of action upon which relief can be granted.

WHEREFORE, having fully answered, Atlas Roofing Company, Inc. prays that the Complaint be dismissed with all costs cast upon the complaintant.

OCCUPATIONAL SAFETY & HEALTH
REVIEW COMMISSION
RECEIVED
JUL 24 1972
Office of the Executive Secretary

STOKES, BOYD & SHAPIRO

By: /s/ McNeill Stokes
McNeill Stokes
Attorney for Atlas Roofing
Company, Inc.

3015 First National Bank Tower
Atlanta, Georgia 30303
(404) 577-3671

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Answer of Atlas Roofing Company, Inc., Respondent, has been posted in a conspicuous place where employees can see it at JABCO Number 4 Warehouse, Granite Road, Arrowhead Industrial Park, Charlotte, North Carolina, and that I have served a copy of the foregoing Answer on the below-listed parties by Certified Mail, Return Receipt Requested, properly addressed and with sufficient postage thereon:

Mr. Beverly R. Worrell
Office of the Solicitor
U.S. Department of Labor
Room 339
1371 Peachtree Street, N.E.
Atlanta, Georgia 30309

Occupational Safety and Health
Review Commission
1825 "K" Street, N.W.
Washington, D.C. 20006

OCCUPATIONAL SAFETY & HEALTH
REVIEW COMMISSION
RECEIVED
JUL 24 1972
Office of the Executive Secretary

This 20th day of July, 1972.

STOKES, BOYD & SHAPIRO

By: /s/ McNeill Stokes
McNeill Stokes
Attorney for Atlas Roofing
Company, Inc.

3015 First National Bank Tower
Atlanta, Georgia 30303
(404) 577-3671

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 22, 1976

McNeill Stokes, Esq.
3920 First National Bank Tower
Atlanta, Georgia 30303

RE: Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission et al., No. 75-746; and Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Commission et al., No. 75-748

Dear Mr. Stokes:

The Court today took the following action in the above cases:

"The petitions for writs of certiorari are granted limited to Question 2 presented by the petitions which read as follows:

'2. Assuming *arguendo* that such civil penalties and enforcement procedures are civil in nature and effect, whether such procedures deny the defendant employer his right to jury trial guaranteed by the Seventh Amendment to the Constitution.'

"The cases are consolidated and a total of one hour is allotted for oral argument."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable in each of these cases.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ June M. Hoffmann/c
(Miss) June M. Hoffmann
Assistant Clerk

Enclosures

Supreme Court, U. S.
FILED
FEB 13 1976
MICHAEL RODAK, JR., CLERK

No. 75-746

In the Supreme Court of the United States

OCTOBER TERM, 1975

ATLAS ROOFING COMPANY, INC., PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

WILLIAM J. KILBERG,
Solicitor of Labor,
Department of Labor,
Washington, D.C. 20210.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-746

ATLAS ROOFING COMPANY, INC., PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the administrative enforcement mechanism of the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. 651 *et seq.*, violates the Sixth Amendment to the Constitution because the civil penalties it authorizes are "penal in nature" but are imposed without constitutional protections such as trial by jury. Assuming that such penalties are in fact civil, petitioner contends that the enforcement procedures violate the right to trial by jury guaranteed by the Seventh Amendment to the Constitution.

1. Petitioner, a roofing contractor with its office in Atlanta, Georgia, was engaged in the construction of a large warehouse roof in North Carolina in June 1972 when one of its employees fell to his death through a roof opening not protected by guardrails or proper covers (Pet. App. 3a, 27a; 1b-13b). As a result of this fatality, the Secretary

of Labor inspected the worksite and cited petitioner for a serious violation of the Occupational Safety and Health Act,[1] ordered the violation to be abated immediately, and proposed a civil penalty of $600. Petitioner timely contested this citation and proposed penalty before an administrative law judge of the Occupational Safety and Health Review Commission, who in May 1973 affirmed the Secretary's citation and held that the proposed penalty was "appropriate and reasonable" (Pet. App. 3a-4a; 1b-3b). The judge's decision became the Commission's final order when no Commissioner directed review. 29 U.S.C. 661(i).

2. Petitioner sought judicial review in the United States Court of Appeals for the Fifth Circuit, which unanimously upheld the administrative findings and rejected petitioner's contentions that the enforcement provisions of the Act violated the Sixth and Seventh Amendments (Pet. App. 1a-27a; 518 F.2d 990). After an extensive analysis of the factors set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, the court of appeals concluded that the civil penalties authorized by the statute are remedial rather than punitive and that they serve as a reasonable adjunct to the primary purpose of the Act—the speedy abatement of dangers to employee safety (Pet. App. 12a-25a). The court also dismissed petitioner's Seventh Amendment claim, relying upon the repeated pronouncements of this Court that the right to a jury trial is inapplicable to administrative proceedings (Pet. App. 25a-26a).

---

[1]29 U.S.C. 654(a)(2) requires all employers affecting interstate commerce to "comply with occupational safety and health standards promulgated under this Chapter." The pertinent standards, 29 C.F.R. 1926.500(b)(1) and (f)(5)(ii), require roof openings to be protected by specified guardrails or covers to prevent falls. See also 29 C.F.R. 1926. 502(b).

3. Petitioner's claims are identical in all respects to those raised by the same counsel representing petitioner Frank Irey, Jr., Inc., in No. 75-748. For the reasons stated in our brief in opposition in No. 75-748, we respectfully submit that the petition for a writ of certiorari should be denied.[2]

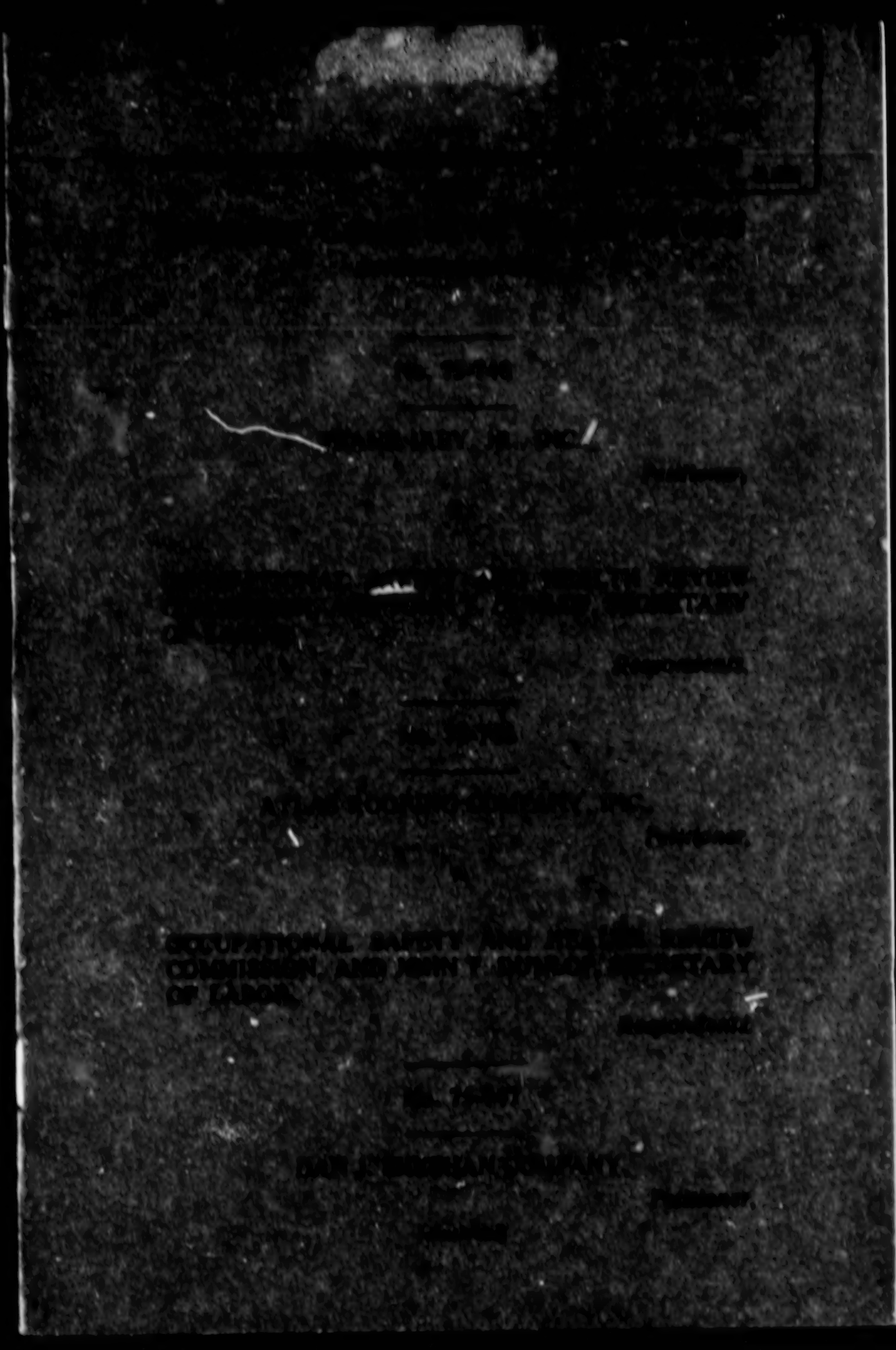
ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,
Department of Labor.

FEBRUARY 1976.

---

[2]We note that here, as in No. 75-748, petitioner's principal contention that the Act's civil willful penalties are criminal in nature (Pet. 10-12, 17-18) is not presented because petitioner was cited only for a serious violation. Furthermore, petitioner's related contention (Pet. 14, n. 9) that the Secretary's OSHA Manual requires that serious penalties be based upon the "degree of the employer's wrongdoing" is supported neither by the portion of the Manual cited nor by any other part of the Manual.



v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS

PETITIONERS' REPLY MEMORANDUM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-748

FRANK IREY, JR., INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

No. 75-746

ATLAS ROOFING COMPANY, INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

No. 75-747

DAN J. SHEEHAN COMPANY,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS

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In their reply to our petitions in these cases, the respondents have taken the position, *inter alia*, that if Congress denominates a particular remedy as civil, that ends the matter, and the protections of the Sixth Amendment simply do not apply. Similarly, the respondents argue that if Congress elects to assign a particular remedy to an administrative agency rather than to a court, that ends the matter, and the Seventh Amendment right to jury trial is not applicable. This mechanical approach to the difficult constitutional arguments raised by these cases elevates form over substance.[1]

[1] Compare *United States v. LeBeouf Brothers Towing Co., Inc.*, 337 F. Supp. 558, 563 (E.D. La. 1974) *appeal pending United States v. LeBeouf Brothers Towing Co., Inc.*, No. 74-3140 (5th Cir.) [Hereinafter cited as *LeBeouf*]:

> At first blush, the paragraph here in question [33 U.S.C. § 1161(b)5, of the Federal Water Pollution Control Act] appears to be nonpenal, especially in view of the purported "civil penalty" that is assessed for the proscribed activity. But to be guided in the interpretive process by such superficial implements as word classification or legal jargon truly would be an analytical pitfall in allowing form

(continued)

1. In response to our argument that in OSHA Congress created criminal penalties clothed in civil dress, the respondents answer that nomenclature must control. They state baldly that "the status of monetary sanctions is a matter of statutory construction and congressional intent . . . ." Opp. Br., No. 75-748, at 10. On this reading, to take an extreme case, Congress could create a "civil penalty" for murder, and provide that the penalty could be imposed without any of the protections guaranteed to criminal defendants by the Sixth Amendment. (*Cf. LeBoeuf, supra*, 377 F. Supp. at 563). Contrary to the respondents' assertion, this Court has not adopted this formalistic view, but has instead emphasized the responsibility of the judiciary to look behind the label in order to determine whether a remedy is truly criminal in nature and effect. In *Trop v. Dulles*, 356 U.S. 86 (1958), the Court considered the same question—whether a particular statute was penal in nature. Noting that "surely form cannot provide the answer to this inquiry," *id.* at 95, the Court rejected the Government's argument that the statute should be considered non-penal because the drafters had not intended to create a criminal statute. See also *Boyd v. United States*, 116 U.S. 616, 633-35 (1886); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144

(footnote continued from preceding page)

> to replace substance. Chief Justice Warren, speaking for the Court in *Trop v. Dulles* . . . recognized the patent inadequacy of such an approach when he remarked: 'How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of labels pasted on them . . .' The real nature and intended objective of a statute must be unearthed to avoid Swiftian-like deceit . . . .

(1963); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 695 (1965); *United States v. U.S. Coin & Currency*, 401 U.S. 715, 718 (1971).

In *Kennedy v. Mendoza-Martinez, supra*, the Court outlined the various factors that should determine whether a particular statute is criminal rather than civil. We analyzed each of these factors in detail at pp. 12-17 of our petition in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, No. 75-846. In answer, the respondents have simply asserted that the OSHA penalties: (1) are not disabilities; (2) are not punitive; (3) do not require a showing of scienter; (4) are remedial in nature; and (5) are not excessive. These naked assertions do not withstand even the most cursory analysis.

The potential penalty under OSHA is as great as $10,000, a sum that is typically the maximum fine in serious offenses under Title 18 of the U.S. Code. The penalty, moreover, is plainly punitive rather than remedial. Unlike back-pay awards or other remedial measures, the OSHA penalty does not go to the injured party but to the U.S. Treasury, just as does any other fine.[2] The respondents' next assertion—that proof of scienter is not required—is flatly wrong. Under the statute, the penalty for willful or serious violations cannot be assessed without proof of either willfulness or negligence. Finally, the legislative history of OSHA suggests that Congress intended to create a punitive remedy, and that it sought to do so without affording

[2]Nor is the OSHA penalty "addressed to any . . . direct fiscal restitution" for the Government. *Cf., LeBeouf, supra*, 377 F. Supp. 568.

employers the rights guaranteed to criminal defendants under the Fifth and Sixth Amendments. See pp. 16-17 of our Petition in *Atlas Roofing Company, Inc. v. OSHRC*, No. 75-746. This Court must not accept the premise whereby, in essence, the availability of constitutional protections turns on the pleasure of Congress.

2. Much the same response can be made to the respondents' claim that the Seventh Amendment right to jury trial is not available here. Again, the respondents ask this Court to look no farther than Congress' determination to "entrust enforcement of a statute, including the imposition of monetary penalties . . . to an administrative tribunal." Opp. Br., No. 75-748, at 13. Yet if Congress sought to entrust monetary penalty actions to a District Court, with no right to a jury trial, this Court would be quick to find that procedure unconstitutional. Can Congress be permitted to achieve the same end simply by assigning the penalty suit to a tribunal that is denominated "administrative" rather than "judicial"? The cases relied upon by the respondents do not support this surprising proposition. As we noted in our petition, the case of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1938), stands for two far narrower principles—that the equitable remedy of back pay can be granted without a jury, and that the Seventh Amendment does not apply to actions of a sort unknown at common law. See *Curtis v. Loether*, 415 U.S. 189, 194 (1974). However, a civil penalty or forfeiture action was well known at common law, and a civil penalty has long been recognized to be a legal, rather than equitable, remedy.

The cases of *Block v. Hirsch*, 256 U.S. 135 (1921), and *Pernell v. Southall Realty*, 416 U.S. 363 (1974),

provide no more support for the respondents' position. The *Block* case was founded on the premise that the landlord-tenant relationship necessarily involves remedies foreign to "suits at common law," and in *Pernell* the Court simply accepted, *arguendo*, the same premise that underlay the decision in *Block*. Finally, the recent case of *National Independent Coal Operators' Ass'n v. Kleppe*, 44 U.S.L.W. 4105, (No. 73-2066, Jan. 26, 1976), provides no support whatsoever for the respondents' position, since the statute at issue in that case provided that civil penalty actions must be brought in the District Courts, where a jury trial would be available upon demand.[3] *Id.*, 44 U.S.L.W. 4108; see *Hepner v. United States*, 213 U.S. 103 (1909); *United States v. J.B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974).

3. The respondents conclude their argument in the *Irey* case, No. 75-748, by disputing our point that OSHA marks an extraordinary departure from prior administrative statutes. *See* Opp. Br., No. 75-748, at 15 and n.8. Yet, as we pointed out in our petition, courts and commentators have remarked repeatedly on the novelty of the OSHA scheme. *See, e.g., Lance Roofing Co. v. Hodgson*, 343 F. Supp. 685, 687 (N.D. Ga.), *aff'd*, 409 U.S. 1070 (1972); *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990 (5th Cir. 1975); Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, Report to the Administrative Conference of the United States, 900 (1972).

[3]The relevance of the case of *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917), to our Seventh Amendment claim is indecipherable. That case, cited in footnote 7 of the respondents' brief, was a Fourteenth Amendment challenge to a state statute, and the Seventh Amendment had nothing at all to do with the matter.

In footnote 8 of their brief, the respondents cite several statutes that they suggest are similar to OSHA in their penalty provisions. The cited statutes, however, are in large measure inapposite. The penalty provisions of the Immigration and Naturalization Act have been upheld specifically on the narrow ground of Congress' extraordinary authority over matters of immigration. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909). And several of the other cited statutes either explicitly or implicitly require that the action for recovery of the civil penalty be brought in District Court. *E.g.*, 40 U.S.C. § 1678(b) (Natural Gas Pipeline Safety Act); 12 U.S.C. § § 1425a(d); 1425b (Federal Home Loan Bank Board). Indeed, in the case of one of the statutes cited, the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 819, the Solicitor General has recently taken the position before this Court that the Act provides for a trial *de novo* in the District Court on both the factual basis of the violation and the amount of the penalty. See *National Independent Coal Operators Ass'n v. Kleppe, supra*, 44 U.S.L.W., at 4107 n.3.

In this regard, one statute *not* mentioned by respondents is the penalty provision of the Federal Water Pollution Control Act, 33 U.S.C. § 1161(b)5, which the *LeBeouf* Court found to be a criminal penalty despite its denomination as "civil". *See LeBoeuf* at 377 F. Supp. 568. The Government, in its Reply Brief in the appeal to the Fifth Circuit in *LeBeouf* tendered the following argument (*United States v. LeBeouf Brothers Towing Co., Inc.*, No. 74-3140, 5th Cir., Reply Brief for Appellant United States, p. 5, footnotes omitted):

The Third Circuit in *Irey* was troubled by the fact that penalties were imposed administratively, with substantial evidence review in the court of appeals the sole avenue for judicial challenge of the administrative determination, but affirmed the validity of the statutory scheme nonetheless (Slip opinion p. 9). In the instant appeals, the spillers had *de novo* trials in the district court, so the problem does not arise. Indeed, in light of the fact that OSHA penalties are imposed administratively with only substantial evidence review, and there is no provision requiring funds collected as penalties be used to further enforcement, a holding that OSHA is civil and remedial ought to apply *a fortiori* to the FWPCA and the Rivers and Harbors Act.

The converse of this argument would appear to be correct: *i.e.*, if *LeBoeuf* were correctly decided, the Third Circuit's *Irey* decision (and the Fifth Circuit's decision in *Atlas*) are wrong *a fortiori*.

In sum, the respondents' effort to pass OSHA off as a routine administrative statute in a long line of similar Acts does not survive even the most cursory examination of this extraordinary statute. A three-judge federal court recently commented on the breadth of the statute in the course of holding that the Fourth Amendment barred the Secretary of Labor from conducting warrantless administrative searches under the authority of OSHA. *Brennan v. Gibson's Products, Inc.*, No. S-75-5-CA (E.D. Tex. Jan. 28, 1976), opinion at 12. The Court there properly declined the invitation to defer to Congress and held that "the inspection provisions of OSHA amount to . . . an attempt at a broad partial repeal of the fourth amendment as is beyond the powers of Congress." *Id.* at 5. The same approach is appropriate with regard to the Fifth, Sixth

and Seventh Amendment claims raised in this case. OSHA is a pervasive regulatory statute placing unprecedented authority in administrative officers over businesses in every sector of the economy, and this Court must determine how far Congress can go, when drafting such a statute, in abolishing constitutional protections by the magic of nomenclature. The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

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OPINIONS BELOW

1. The Irey Case [No. 75-748]

The *en banc* opinion of the Court of Appeals for the Third Circuit is reported at 519 F.2d 1215 and appears at Irey Cert. App. at 1a-25a.[1] The panel opinion of the Court of Appeals is reported at 519 F.2d 1200 (Irey Cert. App. at 1b-26b). The order and opinion of the Occupational Safety and Health Review Commission is reported at 4 OSAHRC 1 (1973) (Irey Cert. App. 1c-8c). The order and opinion of the Occupational Safety and Health Review Commission Administrative Law Judge is reported at 4 OSAHRC 8 (1973) (Irey Cert. App. at 1d-21d).

2. The Atlas Case [No. 75-746]

The opinion of the Court of Appeals for the Fifth Circuit is reported at 518 F.2d 990 (Atlas Cert. App. at 1a-29a). The order and opinion of the Occupational Safety and Health Review Commission is reported at 3 OSAHRC 19 (1973) (Atlas Cert. App. at 1b-13b).

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[1] The designation "Irey Cert. App." refers to the Appendix to the petition for certiorari in the *Irey* case. The designation "Atlas Cert. App." refers to the Appendix to the petition for certiorari in the *Atlas* case. The designation "J. App." refers to the Joint Appendix filed by the parties after certiorari was granted.

JURISDICTION

The judgment of the Court of Appeals upon rehearing in the *Irey* case, was entered on July 24, 1975. A timely Application for An Extension of Time to File Petition For Writ of Certiorari was filed, and an Order was entered extending the time for filing to and including November 21, 1975. The judgment of the Court of Appeals in the *Atlas* case was entered on September 8, 1975.

The petitions for certiorari in both cases were filed on November 21, 1975. On March 22, 1976 this Court granted the petition in both cases limited to Question 2 presented in each petition. J. App. at 40a-41a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) in both cases.

QUESTION PRESENTED

Whether a defendant in a governmental proceeding for a monetary "civil penalty" under Section 17 of the Occupational Safety and Health Act of 1970, 84 Stat. 1608, 29 U.S.C. § 666, is entitled under the Seventh Amendment to a trial by jury before final judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment and other relevant provisions of the Constitution of the United States are reprinted at Irey Cert. App. at 1f-2f.

The Occupational Safety and Health Act of 1970 (hereinafter referred to as "OSHA" or "the Act"), 29 U.S.C. § § 651 *et seq.*, is reprinted at Irey Cert. App. at 1e-31e.

STATEMENT

1. The Statutory Scheme

OSHA was passed by Congress pursuant to its powers to regulate commerce (§ 2(b), 29 U.S.C. § 651, Irey Cert. App. at 1e) and is applicable to all non-governmental employers engaged in a business which affects commerce. § 3(5), 29 U.S.C. § 652(5), Irey Cert. App. at 2e. The purpose of the Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ." Section 2(b), 29 U.S.C. 651, Irey Cert. App. at 1e.

Section 5(a)(1) of the Act (29 U.S.C. § 654(a)(1), Irey Cert. App. at 4e) directs each employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." Section 5(a)(2) also commands employers to "comply with occupational safety and health standards promulgated under this Act." Section 6 (29 U.S.C. § 655, Irey Cert. App. at 4e) authorizes the Secretary of Labor to promulgate occupational safety or health standards under rule-making procedures. Violation of either § 5(a)(1) (the "general duty clause") or § 5(a)(2) (which covers any

regulation promulgated by the Secretary) makes an employer liable to "civil penalties" under Section 17, 29 U.S.C. § 666, Irey Cert. App. at 17e-18e.

Section 17(a)-(c) creates a three-fold classification for civil penalties. An employer who "willfully or repeatedly" violates OSHA "may be assessed a civil penalty of not more than $10,000 for each violation." Section 17(a). An employer who is cited for a "serious violation" *shall* be assessed a civil penalty of up to $1,000 for each violation. Section 17(b). An employer cited for "such violation . . . specifically determined not to be of a serious nature" *may* be assessed a civil penalty of up to $1,000 for each violation. Section 17(c). The Act defines a "serious violation" as existing in a place of employment "if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Section 17(k), 29 U.S.C. § 17(j), Irey Cert. App. at 18e.[2]

Section 17(e) (29 U.S.C. § 666(e), Irey Cert. App. 18e) imposes a criminal penalty of not more than

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[2] The term "willfully" is not defined in the Act, but the Third Circuit panel decision in the *Irey* case defines the term as follows (Irey Cert. App. at 12b):

> Willfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission–it involves an element of obstinate refusal to comply.

$10,000 fine or six months imprisonment for any willful violation causing the death of an employee.

Section 8(a) of the Act authorizes inspectors of the Department of Labor upon presentation of appropriate credentials to enter the workplace without delay at reasonable times and to inspect and investigate in a reasonable manner for violations of the Act. 29 U.S.C. § 657(a)[3] Irey Cert. App. at 9e-11e. The inspector may take testimony and require production of documents under oath (§ 8(b), 29 U.S.C. § 657(b)) and records specified by regulation must be kept under the Act. § 8(c), 29 U.S.C. § 657(c).

Section 9(a) (29 U.S.C. 658(a), Irey Cert. App. at 12e) authorizes the inspector to issue a citation to the employer if, upon inspection or investigation he believes the employer has violated either the general duty clause or a regulation or order promulgated under the Act. The citation states with particularity the nature of the violation and in addition "shall fix a reasonable time for the abatement of the violations." *Id.*

Section 10(a) (29 U.S.C. § 659(a), Irey Cert. App. at 12e) then authorizes the Secretary within a reasonable time after the termination of the inspection or investigation to notify the employer by certified mail of the penalty, if any, proposed under Section 17 of the Act. If the employer fails to notify the Secretary within

[3] In *Brennan v. Gibsons Products, Inc.*, 407 F.Supp. 154 (E.D. Tex 1975) a three-judge District Court construed this section of OSHA to require the Secretary to secure a search warrant under probable cause standards appropriate to administrative searches. *See* See v. City of Seattle, 387 U.S. 523 (1967). The government has been granted an extension of time within which to seek review of this decision.

15 days of his intention to contest the citation or the proposed penalty, the citation, the penalty, and the obligation to correct the cited violation all become final and unreviewable.[4]

Section 10(c) (29 U.S.C. § 659(c), Irey Cert. App. at 12e-13e) provides for a hearing before the Occupational Safety and Health Review Commission ("the Commission") held pursuant to the provisions of the Administrative Procedure Act (5 U.S.C. § 554) upon notice of contest of the citation, the proposed penalty, or the time period specified for abatement.

The Commission is established pursuant to Section 12, 29 U.S.C. § 661, Irey Cert. App. at 14e-16e. The Commission's proceedings are all "of record" and "unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal

[4] Section 10(b) of the Act (29 U.S.C. § 659(b), Irey Cert. App. at 12e) provides that if the Secretary has reason to believe the employer has failed to correct the violation within the time specified for correction in the original citation, the Secretary shall send notification by certified mail of failure to correct and the penalty proposed to be assessed under Section 17(d) of the Act, 29 U.S.C. §666(d), Irey Cert. App. at 17e. Section 17(d) authorizes a daily penalty of "not more than $1,000 for each day during which such failure or violation continues." Section 10(b) provides for suspension of the time period within which the employer must correct the violations until final order of the Commission if the employer contests the original citation, but *only if* the Commission concludes the employer initiated the administrative proceedings "in good faith and not solely for delay or avoidance of penalties." Section 10(b), 29 U.S.C. §659(b), Irey Cert. App. at 12e. If the employer contests the Section 10(b) notice of failure to correct or the proposed daily penalty, he may secure an administrative hearing with limited judicial review under Sections 10(c) and 11(a) of the Act.

Rules of Civil Procedure." Section 12(g), 29 U.S.C. § 661(b), Irey Cert. App. at 15e. Section 12(i), 29 U.S.C. § 661(i) provides for hearings initially before a hearing examiner appointed by the Commission, whose report becomes final unless further review by the Commission is directed. Under Section 17(j) of the Act, 29 U.S.C. § 666(i), Irey Cert. App. at 18e, the Commission is given authority "to assess all civil penalties provided in [Section 17], giving due consideration to the appropriateness of the penalty with respect to the size of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations."[5]

Under Section 11(a) of the Act, 29 U.S.C. § 660(a), Irey Cert. App. at 13e-14e, orders of the Commission are made reviewable in the Court of Appeals if the employer files a petition within sixty days.[6] Section 11(a) provides:

[5]The Commission claims the power to increase the proposed penalty even if the employer's decision to contest is in good faith under Section 10(b) of the Act. See the Third Circuit panel decision in the *Irey* case, Irey Cert. App. at 4b n.3.

[6]Section 11(a) of the Act provides that "[t]he commencement of proceedings under this subsection shall not, unless ordered by the Court, operate as a stay of the order of the Commission."

Section 11(b) of the Act (29 U.S.C. 660(b), Irey Cert. App. at 14e) authorizes the Secretary to seek review or enforcement of

(Footnote continued on next page)

> "The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive."

Decisions of the Court of Appeals are reviewable on certiorari in this Court pursuant to 28 U.S.C. § 1254.

Section 17(1) of the Act (29 U.S.C. § 666(k), Irey Cert. App. at 18e) provides:

> "Civil penalties owed under this chapter shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office."

(Footnote 6 continued from last page)

any final order of the Commission in the Court of Appeals and provides:

> "In any such case, as well as in the case of a noncontested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 10, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the employer named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a), the court of appeals may assess the penalties provided in section 17, in addition to invoking any other available remedies."

As the Third Circuit panel in the *Irey* case below noted (Irey Cert. App. at 6b n. 7):

> "In the House debate, it was stated that this provision should be narrowly construed and was intended to be limited to any process which might be necessary to actually collect the penalty. 116 Cong. Rec. 42207 (1970). Contrast this procedure with the one provided by the Coal Mines Health and Safety Act, 30 U.S.C. § 819(a)(3), where Findings of Fact are required before a penalty is assessed and where an employer is entitled to a limited *de novo* hearing in the District Court . . . ."

See also the *en banc* Third Circuit decision in *Irey*, Irey Cert. App. at 3a n. 2.

Finally, Section 13 of the Act, 29 U.S.C. § 662, Irey Cert. App. at 16e-17e, authorizes injunction proceedings in Federal District Court upon petition of the Secretary "to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonable be expected to cause death or serious physical harm immediately or before the imminence of such danger could be eliminated through the enforcement procedures otherwise provided by this Act."

2. The *Irey* Case and the Third Circuit's Opinions

Petitioner Frank Irey, Jr., Inc. [hereinafter "Irey"] is a general contractor whose construction site was inspected after a report to the Occupational Safety and

Health Review Commission that one of petitioner's employees had died on the site. The employee was killed when the side of a trench in which he was digging collapsed. The inspection took place on January 12 and 13, 1972, and on March 22, 1972, petitioner was served with a Citation for Serious Violation (J. App. at 6a-9a) and a Notification of Proposed Penalty (J. App. at 10a-13a) for one "willful and serious" violation, one "serious" violation, and five non-serious violations. The proposed administrative penalty assessed against petitioner for the willful and serious violation was a fine of $7,500 (J. App. at 10a) and a direction that it abate the condition "immediately". J. App. at 6a.[7]

Irey served a Notice of Contest within the time period allowed and the Secretary thereafter filed a Complaint with the Commission (J. App. at 14a-20a), and Irey filed an Answer denying any violation of the Act. J. App. at 21a-24a.[8]

A hearing was held on the Secretary's Complaint on June 27, 1972, before a hearing examiner of the Occupational Safety and Health Review Commission. At the hearing, Irey moved to dismiss the Secretary's Complaint on grounds of the unconstitutionality of the enforcement procedures of the Act. On November 13, 1972, the administrative hearing examiner rendered a

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[7] The hearing examiner reduced the penalty on the willful violation to $5,000. Irey Cert. App. at 20d.

[8] The willful violation alleged was that Irey violated the Secretary's applicable regulation by failing to adequately support the sides of the trench in which its employee was killed. Secretary's Complaint, para. IV, J. App. at 15a. The facts underlying the allegation are discussed at pp. 80-82, *infra*.

decision affirming certain violations, imposing a $5,000 penalty for the willful violation, and denying the motion to dismiss. Irey Cert. App. at 1d-21d. The Commission directed review of the decision on December 14, 1972, requesting the parties to brief the issue of whether the penalty should be raised to $10,000, (Irey Cert. App. at 4b n.3), and rendered a decision on August 1, 1973, affirming the examiner's decision. Irey Cert. App. at 1c-8c.

Irey petitioned for review and the Court of Appeals, Circuit Judge Gibbons dissenting, held in its judgment and opinion issued on November 4, 1974, that the enforcement procedures of the Act did not contravene Article III or the Fifth, Sixth, or Seventh Amendments to the Constitution, but remanded the case to the Commission for a new determination as to whether the violation committed by Irey was willful, because the Commission had applied an erroneous definition of "willful" in its initial decision. The majority opinion states that "[t]here is force and logic to [Irey's] arguments, and we do not dismiss them lightly," (Irey Cert. App. at 7b) and that, "[i]n the case *sub judice*, candor compels us to concede that the punitive aspects of the OSHA penalties, particularly for a 'willful' violation, are far more apparent than any 'remedial' features." *Id.*

The opinion went on to point out that "[m]uch of petitioner's opposition is centered on the fact that the civil penalties are imposed, not through normal judicial processes but by administrative action – that is, by the executive branch with very narrow review." Irey Cert. App. at 8b. Despite having "serious misgivings as to the wisdom of limiting *de novo* review" and characterizing the denial of a jury trial as "another disturbing element

of this case", the majority rejected this challenge to the constitutionality of OSHA's enforcement procedures. Irey Cert. App. at 8b n. 11.

However, the court then felt compelled to state, at considerable length and with no small amount of force, that it had apparently concluded that *de novo* trial on the merits *should* be afforded. "We perceive no overriding consideration which favors the congressional policy of recent years to insulate administrative adjudication from the open and searching examination, that full jucicial review provides." Irey Cert. App. at 9b n.11.

Irey thereafter filed a timely Petition for Rehearing, which was granted by the Court of Appeals on December 20, 1974, and the case was set to be reargued before the Court of Appeals sitting *en banc*. On July 24, 1975, after reargument and rebriefing, the Court of Appeals by a six-to-four vote, Circuit Judges Gibbons, Aldisert, Hunter, and Garth dissenting, issued its judgment and opinion determining that the judgment of the panel should stand, both as to the constitutionality of the Act and its enforcement procedures and the definition of willfulness. The majority held that this Court, in the case of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), had ruled that the Seventh Amendment did not apply to administrative adjudications "and that Congress is free to provide an administrative enforcement scheme without the intervention of a jury at any stage." Irey Cert. App. at 8a.

The *en banc* majority recognized that the Seventh Amendment requirement of a jury verdict "could be met in a *de novo* trial in the district court on appeal

from an administrative agency" and reiterated that OSHA's failure to provide any more than limited judicial review raises the question of whether this procedure violates the Seventh Amendment. Irey Cert. App. at 2a. The majority apparently continued to share the panel majority's reservations about "the wisdom or desirability of such an administrative adjudicatory process." Irey Cert. App. at 8a-9a.

3. The *Atlas* Case and The Fifth Circuit's Opinion[9]

Petitioner Atlas Roofing Company, Inc. [hereinafter "Atlas"] is a roofing subcontractor whose construction site was inspected after a report to the Occupational Safety and Health Commission that one of Petitioner's employees had died on the site when he fell through a roof opening. On June 15, 1972, the Secretary issued a citation for one "serious" violation with a direction that the condition be abated "immediately." J. App. at 26a-27a. The proposed civil penalty assessed by the OSHA area director for the violation was $600.00. J. App. at 28a-29a.

Atlas served a timely notice of contest and the Secretary thereafter filed a Complaint with the Occupational Safety and Health Review Commission. J. App. at 31a-35a. Petitioner filed an Answer denying any violation of the Act. J. App. at 36a-39a.[10]

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[9] The dissenting opinions in the Third Circuit are discussed at pp. 41-42; 56-59, *infra*.

[10] The serious violation alleged against Atlas was that Atlas violated the Secretary's applicable regulation by failing to provide and maintain a cover or standard railing on all exposed sides for the opening on the roof through which the employee fell. Secretary's Complaint, para. IV, J. App. at 32a.

Atlas moved on August 30, 1972, before the Commission for a jury trial and for procedural due process, and also moved to dismiss on the grounds that OSHA and its enforcement procedures are unconstitutional. These motions were denied for lack of jurisdiction. Atlas Cert. App. at 4a n.6.

A hearing was held on the Secretary's Complaint on November 2, 1972, before a hearing examiner of the Occupational Safety and Health Review Commission. The administrative hearing examiner rendered a decision affirming the violation and the penalty as well as denying the motion to dismiss. Atlas Cert. App. at 1b-13b. The hearing examiner's decision subsequently became the final order of the Commission under § 12(j) of the Act, 29 U.S.C. § 661(i), (Irey Cert. App. at 15e) because no member of the Commission directed review of the decision within 30 days of its filing.

Atlas petitioned for review and the Court of Appeals for the Fifth Circuit, in an opinion by Chief Judge Brown filed on September 8, 1975, held that the enforcement procedures of the Act did not contravene Article III or the Fifth, Sixth, or Seventh Amendments to the Constitution. Atlas Cert. App. at 1a-29a. The Court rejected Atlas' contention that even if the penalties are civil in nature, "the Seventh Amendment requires that Congress provide a system of enforcement that gives employers the opportunity to put their case before a jury in a de novo proceeding in the District Court." *Id.* at 25a.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases present the question of the right to jury trial under the Seventh Amendment in the context of the Occupational Safety and Health Act, which has been characterized as a "seemingly unique piece of legislation . . . ." *Lance Roofing Co. v. Hodgson*, 343 F. Supp. 685, 686 (N.D. Ga.), *aff'd*, 409 U.S. 1070 (1972). U.S. 1070 (1972).

In drafting OSHA, Congress devised a most unusual administrative enforcement scheme. Unlike the overwhelming majority of statutory schemes for the determination of civil penalties, the OSHA procedure gives the administrative agency the full power to adjudicate a violation and to assess a punitive monetary penalty subject only to very limited judicial review and without any right on the defendant's part to invoke the participation of a jury at any stage in the proceedings. The OSHA scheme is as far reaching as it is unusual; thus the statute applies to virtually every employer in the country, and, as the Fifth Circuit pointed out in the *Atlas* case, the OSHA model for strict administrative imposition of civil penalties with very limited judicial review and no jury rights has been recommended as a model for the enforcement systems of all administrative agencies for the future. Atlas Cert. App. at 6a.

A defendant in proceeding to determine liability for an OSHA monetary civil penalty has a Seventh Amendment right to a jury prior to final judgment of liability for the penalty. *First*, the historical background of the Seventh Amendment and the Judiciary Act of

1789, Ch. 20, 1 Stat. 73 *et seq.*, demonstrates that the Seventh Amendment was intended to apply to federal governmental proceedings seeking monetary civil penalties against individuals for violations of federal statutes. *See* pp. 20-31, *infra*.

Second, under all of the major analytical criteria set forth in this Court's Seventh Amendment cases for determining the scope of the Seventh Amendment, a civil penalty proceeding qualifies as a suit at common law within the meaning of the Seventh Amendment. Under English common law at the time of the enactment of the Seventh Amendment, *see Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935), a governmental proceeding for a civil penalty for violation of a statute would have been triable to a jury, whether the proceeding was brought by a representative of the Crown or by an informer on behalf of the Crown. *See* pp. 34-38, *infra*. A civil penalty proceeding, and particularly a civil penalty proceeding in the context of OSHA, cannot in any sense be analogized to a proceeding in equity (or admiralty). *See Parsons v. Bedford*, 28 U.S. [3 Pet.] 443, 447 (1830), *quoted with approval* in *Ross v. Bernhard*, 396 U.S. 531, 533 (1970) and *Curtis v. Loether*, 415 U.S. 189, 193 (1974). And, an OSHA proceeding for an in personam monetary civil penalty is a suit "for the recovery of a money judgment. . . ." *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891), *quoted with approval* in *Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974). A governmental proceeding for a civil penalty, then, is classically a suit at common law within the meaning of the Seventh Amendment. In fact, civil penalty proceedings for monetary penalties or forfeiture of

property have been consistently recognized in the federal courts from the Nation's birth down to the present as common law actions carrying a Seventh Amendment jury right. *See* pp. 38-42, *infra*. If Congress had placed the OSHA penalty adjudication in a United States District Court in the first instance rather than an administrative tribunal, Irey and Atlas would unquestionably have a Seventh Amendment right to a jury.

Both lower courts here ruled in reliance principally on this Court's decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937) that the Seventh Amendment is not applicable when Congress places the governmental proceeding in an administrative agency rather than a United States District Court. The lower courts misread *Jones & Laughlin*, which only holds that Congress could permit the NLRB to grant a back pay award as incidental to the NLRB's power to grant statutory remedies primarily equitable in nature. *See* pp. 46-56, *infra*. In the OSHA context, the monetary civil penalty adjudication cannot in any sense be analogized to monetary relief incidental to equitable remedies. *See* pp. 65-68, *infra*.

Since a civil penalty proceeding is a suit at common law within "the clear command of the Seventh Amendment," *Curtis v. Loether, supra*, 415 U.S. at 198, a right to trial by jury must be provided at some stage prior to final judgment without regard to policy considerations. *See* pp. 71-75 *infra*.

In any event, policy considerations favor recognition of a right to trial by jury to determine liability for an OSHA civil penalty before final judgment.

First, and most importantly, since an OSHA civil penalty proceeding is a governmental proceeding against the individual which, at the very least, comes close to the line which divides "criminal" from "civil" proceedings for constitutional purposes, there are unique and overriding policy considerations under this Court's cases interpreting the constitutional values underpinning the jury right generally for recognizing the right to trial by jury in these cases. *See Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *cf. United States v. United States District Court*, 407 U.S. 297, 313 (1972). *Second*, as these two cases illustrate, the factual issues involved in determining violations of OSHA are not only well within the range of the "practical abilities and limitations of juries," *Ross v. Bernhard, supra*, 396 U.S. at 538 n. 10, but actually best suited for jury determination. *See* pp. 78-83, *infra*. *Third*, experience with the overwhelming majority of statutory schemes for civil penalties which permit *de novo* district court review with a right to trial by jury refutes any contention that recognition of such a right in the context of an OSHA civil penalty adjudication would result in crowding the dockets of the district courts or overburdening the administration of justice. *See* pp. 83-85, *infra*. *Fourth*, there is no likelihood of substantial interference with the agency's law enforcement goals, even assuming *arguendo* that this is a legitimate policy interest that the government might advance to defeat the claim of jury right, because *de*

novo review in district court would come after the administrative process is complete. *See* pp. 86-87, *infra.*

I.

A DEFENDANT IN A PROCEEDING TO DETERMINE LIABILITY FOR A MONETARY CIVIL PENALTY FOR VIOLATION OF A STATUTE HAS A SEVENTH AMENDMENT RIGHT TO A JURY BEFORE FINAL JUDGMENT.

A. The Historical Background of the Seventh Amendment Demonstrates that the Amendment is Particularly Applicable to Governmental Civil Penalty Proceedings.

As this Court observed in *Parsons v. Bedford,* 28 U.S. [3 Pet.] 433, 446 (1830), "one of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases." Indeed, "of the seven States which, in ratifying the Constitution, proposed amendments, six included proposals for the preservation of jury trial in civil cases." *See Galloway v. United States,* 319 U.S. 372, 398 n. 3

(1943) (Black, J., dissenting.)[11] In *Colgrove v. Battin,* 413 U.S. 149, 152-56 (1973), this Court summarized the debates during and after the Federal Convention in Philadelphia concerning whether or not the new Constitution should include an express guarantee of the civil jury right. As the historical materials quoted in *Colgrove* demonstrate, the rationale for omitting an express civil jury guarantee from the Constitution was that: (a) the variety of practices among the several states with respect to "common law" jury rights prohibited an effective general provision in the Constitution preserving the right as to civil trials and

[11] *See also* Henderson, "The Background of the Seventh Amendment," 80 Harv. L. Rev. 289, 295 (1967):

> "The Constitution was signed and transmitted to the Continental Congress on September 17, 1787. George Mason and Edmund Randolph of Virginia and Elbridge Gerry of Massachusetts refused to sign the document, and several other members of the Convention had left before the final session. Within a month, the whole country was divided into Federalist and anti-Federalist parties. The almost complete lack of any bill of rights was a principal part of the anti-Federalist argument; the lack of provision for civil juries was a prominent part of this argument, and the Supreme Court's appellate jurisdiction in law and in fact was treated by the anti-Federalists as a virtual abolition of the civil jury . . . ."

In refusing to sign the new Constitution, Mr. Gerry stated as one of his principal objections to the document that it gave Congress the power "to establish a tribunal without juries, which would be a Star-chamber as to civil cases." Records of the Federal Convention of 1787, at 633 (M. Ferrand, ed. 1937).

(b) that the Congress could safely be entrusted with the task of regulating the scope of the jury right. *See also The Federalist* No. 83 (A. Hamilton).[12] The critical point about these various contentions is that the Congress and the country rejected them by enacting the Seventh Amendment.

The Amendment was considered and enacted upon by the same Congress that passed the Judiciary Act of 1789, Ch. 20, 1 Stat. 73 *et seq.* In giving analytical content to the scope of the jury right as created by the Seventh Amendment, this Court has taken recourse to the contemporaneous delineation of civil jury rights in the Judiciary Act of 1789. *See, e.g., Parsons v. Bedford, supra,* 28 U.S. [3 Pet.] at 447; *Colgrove v. Battin, supra,* 413 U.S. at 153-55 n. 8. As this Court observed in *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265, 297 (1887):

> "[The Judiciary Act of 1789] . . . was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning."

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[12] Alexander Hamilton devoted Federalist No. 83 entirely to the civil jury trial issue, noting at the outset that "The objection to the plan of the convention, which has met with most success in this State, and perhaps in several of the other States, is *that relative to the want of a constitutional provision* for the trial by jury in civil cases." *See* The Federalist No. 83, at 495 (The New American Library of World Literature, ed. 1961) (emphasis in original).

The Ninth Section of the Federal Judiciary Act of 1789, 1 Stat. 73, 76-77, provided (emphasis added):

> "SEC. 9. And be it further enacted, That the district courts(c) shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; (a) saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, *and of all suits for penalties and forfeitures incurred, under the laws of the United States.* (b) And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. (c) And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except

> for offences above the description aforesaid. (d) *And the trial of issues in fact, in the district courts in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.*"

In construing this language in connection with the Seventh Amendment in *Parsons v. Bedford, supra,* 28 U.S. [3 Pet.] at 447, the Court observed (emphasis added):

> "In a just sense, the Amendment then may well be construed to embrace *all suits which are not of equity and admiralty jurisdiction,* whatever may be the peculiar form which they may assume to settle legal rights. And Congress seems to have acted with reference to this exposition in the Judiciary Act of 1789, Ch. 20 (which was contemporaneous with the proposal of this Amendment); for in the Ninth Section it is provided that 'the trial of issues in fact in the district courts in all causes, except the civil causes of admiralty and maritime jurisdiction, shall be by jury;' and in the Twelfth Section it is provided that 'the trial of issues in fact in circuit courts shall in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury;' and again in the Thirteenth Section, it is provided that 'trial of issues of fact in the Supreme Court in all actions at law against citizens of the United States shall be by jury.'"

See also Capital Traction Co. v. Hof, 174 U.S. 1, 9-10 (1899). Thus, the Judiciary Act, as originally passed, explicitly took cognizance of "all suits for penalties and forfeitures incurred, under the laws of the United States" and explicitly classified those suits as suits to be tried by a jury. In the face of this legislative history, contemporaneous with the enactment of the Seventh Amendment itself – which must be taken as "weighty evidence" of the "true meaning" of the Seventh Amendment, *cf. Wisconsin v. Pelican Insurance Co.,*

supra, – the government's position that Congress may abolish the historic right to a jury in an in personam civil penalty action simply by shifting the focus of the action to an administrative tribunal strikes at the heart of our Constitutional heritage and judicial system as it was conceived by the Framers of the Bill of Rights.[13]

The position of the authors of the Seventh Amendment and the Judiciary Act of 1789 on jury participation in governmental attempts generally to levy fines and penalties on the people of this country was but a natural reflection of an historic battle with the English Crown which began before the Revolution and played a significant part in the events leading to the Declaration of Independence. Thus, the famous case of *Sewall v. Hancock* (in the Court of Vice Admiralty in Boston, 1768) was an in personam action against John Hancock brought by the Advocate General of Massachusetts as an informer (Jonathan Sewall) seeking a penalty three times the value of certain goods

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[13]The provision of the original Judiciary Act respecting exclusive District Court jurisdiction over "all suits for penalties and forfeitures incurred, under the laws of the United States", is presently embodied in 28 U.S.C. §1335 (1970 ed).

Through the process of codification and recodification of the Judicial Code of the United States over the past 200 years, various other parts of the original Section Nine of the first Judiciary Act were disbursed through other parts of the Judicial Code. The Reviser's Note to the 1948 revision of the Judicial Code indicates that the original Judiciary Act provision for the right of jury trial in the District Courts was omitted in 1948 "as covered by Rule 38 of the Federal Rules of Civil Procedure." *See* Legislative History, 1948 Note, 28 U.S.C. §1873, at 7623 (1970 ed).

allegedly unloaded in Boston Harbor from Hancock's sloop *Liberty* without payment of duties. *See* 2 *Legal Papers of John Adams,* 173-210 (Z. L. Wroth & H. B. Zibot eds. 1965) [hereinafter "Adams Papers"].[14] The proceeding was based on the American Act of 1764, 4 Geo. 3, c. 15, §37, which provided, *inter alia,* that "every person who shall be assisting, or otherwise concerned," in unloading of goods without payment of duties "shall for each and every offense forfeit treble the value of such goods . . . ."[15] The statute provided

[14]The editors of Adams Papers tell us (*id.* at 184-85) (footnotes omitted):

> "The trial of Hancock and the others was an event of major political importance in the colonies. Its very length played into the hands of the revolutionary propagandists. From November 1768 until the following summer, "A Journal of the Times," which appeared in a variety of colonial newspapers, carried periodic accounts of the proceedings, interspersed with tart comments on the twin themes of the venality of the Customs Commissioners and the arbitrary injustice of the Court of Admiralty. These attacks helped to establish the Commissioners as obnoxious at the very beginning of their tenure. Their effectiveness was permanently damaged and they served until the Revolution in an atmosphere of constant hostility.
>
> "The attack on the Admiralty Court was buttressed by a portion of Adams' draft argument in the case, which was widely circulated as part of his Instructions to the Boston Representatives of May, 1769. These and other responses to the prosecution of revenue cases brought the Vice Admiralty Courts under the disapprobation of the colonists. The jurisdiction was more and more invoked only in the enforcement of the Acts of Trade, and ordinary civil maritime cases were tried in the common-law courts. A multitude of revenue cases in each port served to stir up local feeling . . . ."

[15]Hancock's sloop *Liberty* was the subject of a separate (and successful) in rem forfeiture proceeding for the same transaction (*see id.* at 177-80) under the same statute (*id.* at 195-96).

for an in personam civil penalty proceeding in the Admiralty Court "precisely because forfeitures alone were not sufficient to deter violators." (Adams Papers at 187).

The statute made provision for trial at common law or in admiralty "because it was a truism that no jury could be found to convict for violations of the Acts of Trade" (*id.* at 188) (footnotes omitted):[16]

> "The statute provided the choice of proceeding at common law or in Admiralty, because it was a truism that no jury could be found to convict for violation of the Acts of Trade. After the recent failure to indict the *Liberty* rioters, the Commissioners can hardly be blamed for accepting truism as truth and exercising the option to proceed in Admiralty. Since the trial was in Admiralty, it was by information, not indictment; it was before a judge sitting without a jury; and the whole range of civil law procedure followed in the High Court of Admiralty in England was invoked – interrogatories, irregular sessions, secret examination of witnesses, and the rest. Whether these procedures were 'illegal' depended not on their inherent qualities but upon the power of Parliament to place violations of the statute within the Admiralty jurisdiction. There was much dispute on this point, and it is not surprising that the Commissioners upheld the parliamentary side of a constitutional question which was resolved only by the Revolution."

[16]As this Court noted in *C. J. Hendry Co. v. Moore,* 318 U.S. 133, 141 (1943) "The rise of the vice-admiralty courts [was] prompted in part by the Crown's desire to have access to a forum not controlled by the obstinate resistance of American juries . . . ."

As John Adams viewed the matter in his draft of his argument for the Court and his "Instructions of the Town of Boston to their Representatives" (*id.* at 199 n. 93),[17] one of the especially obnoxious features of this "American Act" was that the English Parliament had allowed non-jury proceedings for penalties and fines (*id.* at 199-200) (emphasis in original, footnotes omitted):

> "2. The Legislative Authority by which it was made is not only grievous, but the Executive Courts by which it is to be carried into effect is another. In the 41st section of this Act 4 G. 3, c.15, we find that "All the Forfeitures and Penalties inflicted by this or any other Act [*or Acts*] of Parliament, relating to the Trade and Revenues of the said British Colonies or Plantations in America, which shall be incurred there, shall and may be prosecuted, sued for, and recovered, in any Court of Record, or *in any Court of Admiralty*, in the said Colonies or Plantations where such offence shall be committed, or in any Court of Vice Admiralty which may or shall be appointed over all America, (which Court of Admiralty or Vice Admiralty, are hereby

[17]When Hancock's sloop Liberty was originally seized, Boston was in an uproar, and a series of town meetings developed which led to the formation of a town committee including John Adams (Adams Papers at 176). Adams drew up a set of "instructions" for the representatives of the committee (*id.*).

Adams never got to give his "draft" argument in court because Sewall eventually withdrew his action on behalf of the Crown against Hancock. *Id.* at 183. *But see id.* at 192:

> ". . . [H]e used his arguments on the right to a jury trial almost verbatim in his Instructions to the Boston Representatives in May 1769. This document was carried in the newspapers as well as in a 'Journal of the Times', and so played a political role."

> respectively authorized and required to proceed, hear, and determine *extraordinary* Penalties and Forfeitures, are to be heard and try'd – *how*? Not by a Jury, not by the Law of the Land, [but] by the civil Law and a Single Judge. Unlike the Ancient Barons who una Voce responderunt, Nolumus Leges Angliae mutari, The Barons of modern Times have answered that they are willing, that the Laws of England should be changed, at least with Regard to all America, in the most tender Point, the most fundamental Principle. And this Hardship is the more severe as we see in the same Page of the Statute and the very preceeding section § 40, That all Penalties and Forfeitures, herein before mentioned, which shall be incurred in Great Britain, shall [*and may*] be prosecuted, sued for and recovered in any of his Majestys Courts of Record in Westminster or in the Court of Exchequer in Scotland respectively.'
>
> "Here is the Contrast that stares us in the Face! The Parliament in one Clause guarding the People of the Realm, and securing to them the Benefit of a Tryal by the Law of the Land, and by the next Clause, depriving all Americans of that Priviledge. What shall we say to this Distinction? Is there not in this Clause, a Brand of Infamy, of Degradation, and Disgrace, fixed upon every American? Is he not degraded below the Rank of an Englishman? Is it not directly, a Repeal of Magna Charta, as far as America is concerned? It is not att all surprising that the Tryals of Forfeiture and Penalties are confined to the Courts of Record at Westminster, in England. The Wonder only is that they are not confined to Courts of common Law here."

The Seventh Amendment issue posed in this case – *i.e.*, whether Congress may eliminate the usual jury right in a civil penalty proceeding by substituting an

administrative law judge for a United States District judge – has a specific historical analogue in the pre-Revolutionary constitutional debate posed by the American Act of 1764 (Adams Papers at 188 n. 64):

> "One basic issue was the power of Parliament to pass such legislation without colonial representation. See JA's Argument, text following note 89 below. The colonial position, which had at first been that there should be no taxation without representation, gradually broadened after 1765 into a denial of all parliamentary power over the colonies; moreover, the remedy sought became not representation in Parliament, but colonial home rule. Needless to say, the orthodox English view was opposed to the colonial stand. Miller, *Origins of the American Revolution* 225-231. Equally critical was the question of the power of Parliament, however constituted, to interfere with what the colonists claimed as fundamental rights. In his argument for Hancock, JA urged that trial in Admiralty was an interference with the right of trial by jury, and others argued, if he did not, that such statutes were void. See text at notes 92-104. The English position was that Parliament could not be controlled in this regard. No. 44, notes 32-34."

The case of *Sewall v. Hancock* crystalized that constitutional debate, and the omission of a civil jury guarantee from the original Constitutional Convention led to its renewal and ultimate resolution in the simultaneous enactment of the Seventh Amendment and the Federal Judiciary Act of 1789, specifically

preserving the right to trial by jury in civil penalty and forfeiture actions.[18]

[18] The editors of Adams Papers observe (*id.* at 185):

> ". . . *Sewall v. Hancock* helped to unite this feeling [against the jurisdiction of the Vice Admiralty Courts in enforcing the Acts of Trade] and to produce the single impulse against the courts which increased steadily until its manifestation in the Declaration of Independence."

The Declaration of Independence enumerates among the sins of the English Crown that

> "he has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:
>
> * * * * * *
>
> "For depriving us in many cases, of the benefits of Trial by Jury . . . ."

Compare this Court's treatment in *Berger v. New York*, 388 U.S. 41, 58 (1967) of *Entick v. Carrington*, 19 How. St. Tr. 1029, in giving analytical content to the language of the Fourth Amendment.

In *Capital Traction Co. v. Hof, supra*, 174 U.S. at 6, this Court also observed:

> "II. The first Continental Congress, in the Declaration of Rights adopted October 14, 1774, unanimously resolved that 'the respective Colonies are entitled to the common Law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." 1 Journals of Congress, 28.
>
> "The Ordinance of 1787, declared that the inhabitants of the Northwest Territory should 'always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury', 'and of judicial proceedings according to the course of the common law.' 1 Charters and Constitution, 431."

B. A Civil Penalty Proceeding is in Any Event a "Suit at Common Law" Within the Meaning of the Seventh Amendment.

In *Parsons v. Bedford*, 28 U.S. [3 Pet.] 433, 446 (1830), *quoted with approval* in *Ross v. Bernhard*, 396 U.S. 531, 533 (1970) and *Curtis v. Loether*, 415 U.S. 189, 193 (1974), this Court defined the term "common law" as used in the Seventh Amendment as follows (emphasis added):[19]

> "The phrase 'common law', found in this clause, is used in contradistinction to equity, and admiralty and maritime jurisprudence. The Constitution had declared in the third article, 'that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under this authority,' etc. and to all cases of admiralty and maritime jurisdiction. It is well known that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is that this distinction was present to the minds of the framers of the amendment. By common law they meant what the Constitution

[19]The Seventh Amendment states:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of the common law."

> denominated in the third article 'law'; not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were administered; or where, as in admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. Probably there were few, if any, States in the Union, in which some new legal remedies differing from the old common law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. *In a just sense, the amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights . . . .*"

And in *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891), *quoted with approval* in *Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974), this Court offered the following definition of an action at law (emphasis added):

> "It would be difficult, and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law . . . but this may be said, that where an action is simply for the recovery and possession of specific real or personal property, *or for the recovery of a money judgment*, the action is one at law."

And in *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935) this Court, after quoting the Seventh Amendment, observed:

> "The right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted. The amendment not only preserves that right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of reexamination existing under the common law . . . ."

See also Capitol Traction Co. v. Hof, 174 U.S. 1, 7-8 (1899).

Under English common law, at the time of the adoption of the Seventh Amendment, a "civil" proceeding brought by the government seeking a penalty for violation of a "penal" statute protecting a public interest would be tried in a common law court with a right to trial by jury.

Thus one contemporary treatise on "penal statutes" first defines the concept as encompassing "an Act of Parliament which orders or prohibits the doing of anything under a certain penalty." I Espinasse, A Treatise on the Law of Action on Penal Statutes 5 (1813) [hereinafter cited as "Espinasse"], and then tenders the following breakdown within the concept (*id.* at 6):

> "Some of these Statutes give penalties for breach of a public duty; others are as a compensation for private wrong: In some, the penalty is expressly given, and the person designated who shall sue for the same: In others the penalty is given but there is no express appropriation of it, nor is the person pointed out

> who is to sue for its recovery: In some, the mode of enforcing payment of the Penalty is omitted, in others the distribution: And some Penal Statutes are confined to one mode of proceeding, in others to several. These require distinct considerations."

Regarding "penal statutes . . . *which are of a public nature*, and give a penalty generally or a breach of them, but *without appropriating it to any purpose, person or persons whatever*" (*id.* at 8) (emphasis in original) the treatise observes (*id.*) *citing Rex v. Malland*, 93 Eng. Rep. 877 (K.B. 1728):[20]

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[20]The report of *Rex v. Malland*, 93 Eng. Rep. 877 (K.B. 1728) reads (citations omitted):

"Where there is no appropriation of a statute penalty, it is a debt to the Crown, and suable for in a Court of Revenue, and not by indictment. Fitz 47. 2 Sess. Ca. p. 12, No. 19. 1 Barn. B. R. 108, S.C.

"Indictment on the statute of the late King, 12 Geo. 1, c. 35, for burning place bricks and stock bricks together. And on demurrer it was objected by Mr. Fazakerley, that in this particular instance, though a penalty of 20s. per thousand is given, yet there is no appropriation of it, or any method prescribed in which it shall be recovered, though there is as to all the rest. And upon looking into the Act, it appeared this offence was omitted out of the clause, which gave the Bricklayers Company power to sue for the penalties; and therefore the Court held, that the 20s. per thousand was in the nature of a debt to the Crown, where the unappropriated penalty woudl go, and was suable for in a Court of Revenue, and not by indictment. Though Strange cited 1 Mod. 34. 1 Vent. 63, and insisted, that the 20s. ought to be the measure of the fine upon the indictment (1). Judicium pro def.' "

> "With respect to these the rule is, 'That where a penalty is so given, and there is no appropriation of it to any person or for any purpose; it is a debt due to the Crown, and recoverable in the Court of Exchequer, by which mode only it should seem that the penalty can be enforced.'"

The Court of Exchequer by the time of the adoption of the Seventh Amendment (and, indeed, well before), was a revenue court trying cases brought by the King to collect his debts in which there was a right to trial by jury in such actions. *See Damsky v. Zavatt*, 289 F.2d 46, 49-50 (2d Cir. 1961); Plucknett, *A Concise History of the Common Law* (5th ed.) at 159-60.

Moreover, by the time of the adoption of the Seventh Amendment (and well before) penal statutes embracing a public interest but allowing proceedings to be brought by private persons as informers [*i.e., Qui tam* proceedings, *see* Espinasse, *supra*, at 6] were also actions triable to juries.

Thus, in 1624 Parliament enacted "an Act for the ease of the Subject," concerning "Information Upon Penal Statutes," 21 James I, c. 4, which was a fundamental reform in *qui tam* proceedings aimed at a pattern of abuses which had developed by virtue of reliance on informers. *See generally* 1 W. Holdsworth, *A History of English Law* 355-360. The statute covers "all offences hereafter to be committed against any Penal Statute, for which any common Informer or Promoter may lawfully ground any popular Action, Bill, Plaint, Suit, or Information, before Justices of Assize, Justices of Nisi prius, or Gaol-delivery, Justices of Oyer and Terminer, or Justices of Peace in their General or Quarter Sessions," and provides, *inter alia*, that "the

like Process upon every popular Action, Bill, Information, or Suit . . . be had and awarded, to all Intents and Purposes, as in an Action of Trespass, Vi & Armis, at the Common Law; . . ." (21 James I, c. 4, §1). Sections II and IV of the Act then make reference to "Evidence to the Jury that shall try such Issue," and "Evidence to the Jury that shall try the same" respectively. The statute, incidentally, was aimed at reforming prior practice which had permitted the trial of such actions in "his Majesty's Courts at Westminster" (Section I) regardless of the County where the alleged violation of the Penal Statute occurred.

Thus, regardless of whether the "Public Concern" (Espinasse, *supra*, at 6) embodied in a "penal" statute was vindicated by a proceeding brought by the government or by a *qui tam* action brought on behalf of the government, the proceeding seeking the penalty was a classic common law action carrying a right to trial by jury. *See also* the Report of *Roe v. Roe* in Hardres Reports of Cases in the Court of Exchequer 285 (1792) (emphasis added):

> "*Roe versus Roe.*
>
> "In an information at the suit of *Cross, tam quam* for selling and importing to be sold foreign woollen, *contra formam statuti*, and issue thereupon; it was said by the court, that it is not material upon the trial, whether the forfeiture, or any part of it be given to the informer or not; for that is matter of law and not matter of fact, and may properly be alleged in arrest of judgment; *for the substance of the issue and matter of fact to be tried by the jury is*, whether such cloth was imported to be sold; and if there be no law to prohibit it, or if there be, and that law gives the informer no part of the forfeiture; this is matter of

law, which the court is to determine, [illegible]ute, if any be, being a general law, otherwise [illegible] were a particular law.

"And afterwards judgment was given for the king only, because no act of parliament gives the informer a share."

Finally, it is worth noting that at least as early as 1775, the concept of a "civil" (as opposed to "criminal") proceeding to vindicate the public interest in a civil penal statute was recognized at common law in England. See Lord Mansfield's decision in *Atcheson v. Everitt*, 98 Eng. Rep. 1142, 1147-48 (K.B. 1775).

The federal courts have consistently recognized that a civil action brought by the United States Government seeking, on grounds of violation of a federal statute, a monetary penalty or a forfeiture of property seized on land, is a "suit at common law" within the meaning of the Seventh Amendment jury right.

First, with reference to monetary civil penalties, as the Second Circuit observed in *United States v. J.B. Williams Co.*, 498 F.2d 414, 422-23 (2d Cir. 1974):

> "There can be no doubt that in general 'there is a right of jury trial when the United States sues . . . to collect a penalty, even though the statute is silent on the right of jury trial.' 5 Moore, Federal Practice ¶ 38.-31[1], at 232-33 (1971 ed.). The leading case supporting this proposition is Hepner v. United States [231 U.S. 103] 115, where the Court had no difficulty in concluding that in an action to collect a $1,000 penalty assessed for a violation of the Alien Immigration Act '[t]he defendant was, of course, entitled to have a jury summoned.' See also United States v. Regan [232 U.S. 37], 43-44, 47."

See Rogers v. Loether, 467 F.2d 1110, 1120 nn.33 & 37 (5th Cir. 1972) *aff'd. sub nom. Curtis v. Loether, supra, discussing Porter v. Warner Holding Co.*, 328 U.S. 395, 401-02 (1946); *Damsky v. Zavatt*, 289 F.2d 46, 48 (2d Cir. 1961); *Connolly v. United States*, 149 F.2d 666 (9th Cir. 1945); *United States v. Jepson*, 90 F.Supp. 983 (D.N.J. 1950). *See generally* 5 J. Moore, Federal Practice, ¶38.31[1], at 232-33 (1971 ed.). *See also United States v. Wonson*, 1 Gall. 4-5, 14, 20 (Circuit Ct. 1812) (Story, J.) *discussed in Capitol Traction Co. v. Hof*, 174 U.S. 1, 8 (1893).[21]

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[21] The *Wonson* opinion was authored by Mr. Justice Story on Circuit in 1812 (who also wrote *Parsons v. Bedford, supra*, and whose Commentaries on the Constitution of the United States have been recognized as "a primary source" on the Constitution's meaning. See Professor Sutherland's Introduction, J. Story, 1 Commentaries on the Constitution of the United States, p. x (1968 ed.). This Court has recognized the *Wonson* case as significant authority on the Seventh Amendment. *See* Slocum v. United States, 228 U.S. 364, 377 (1913).

The *Wonson* case was an "action [for] debt for a penalty incurred under the 3rd section of the embargo supplementary Act, Jan. 9, 1808, ch. 3" brought in federal District Court by the government. 1. Gall. at 4. The defendant won a verdict below and the United States filed an appeal to the Circuit Court, thereby raising two questions (1 Gall. at 5) (emphasis added):

> "1. Whether this action, ***being a common law suit***, can be brought before this Court by appeal, or ought not to be by writ of error. 2. Supposing the action rightly before the Court, whether the facts are again to be submitted to a jury in this Court, or the appeal submits questions of law only for the consideration of the Court."

The government relied on the Act of March 3, 1803, ch. 93, s. 2, on both issues, but the Court rejected the government's construction of the Act, because, as to the second issue, the Act so construed would be void under the Seventh Amendment's prohibition against reexamination by an appellate court of facts

(Footnote continued on next page)

Second, with reference to "forfeiture of articles seized on land for violation of federal statutes," this Court in *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 153 (1943) summarized the law as follows:

> "The Court has never held or said that the admiralty jurisdiction in a forfeiture case is exclusive, and it has repeatedly declared that, in cases of forfeiture of articles seized on land for violation of federal statutes, the district courts proceed as courts of common law according to the course of the Exchequer on informations *in rem* with the trial by jury. *The Sarah*, 8 Wheat 391, 396 n. A; *443 Cans of Frozen Egg Product v. United States*, 226 U.S. 172, and cases cited. In *United States v. 422 Casks of Wine*, 1 Pet. 547, Justice Story defined such an action as a libel or information *in rem* on the Exchequer side of the court. And see Chief Justice Marshall's reference in *Schooner Hoppett v. United States*, 7 Cranch 389, 393, to 'proceedings in Courts of common law, either against the person or the thing, for penalties or forfeitures.' In all this we perceive a common understanding of judges, lawyers, and text writers, both before and after the adoption of the Constitution, of the common law nature of the procedure and judgment *in rem* in forfeiture cases,

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(Footnote 21 continued from preceeding page)
once tried by a jury in a common law action. 1. Gall. at 11, 18-21. Justice Story then added the following post-decision memorandum (1 Gall. at 21):

> "Memorandum. There were a great number of causes on the docket standing on the same ground, and as the District Attorney ultimately expressed himself satisfied with the opinion of the Court, and declined to have a re-examination at the Supreme Court, the Circuit Court ordered this cause, as well as all the others, to be dismissed for want of jurisdiction."

> and of its use in such proceedings in the Exchequer and in the American common law courts."

See also United States v. Winchester, 99 U.S. 372, 374 (1878); *United States v. $5,372.85 United States Coin & Currency*, 283 F.Supp. 904, 905-06 (S.D.N.Y. 1968); *Vandevander v. United States*, 172 F.2d 100, 101 (5th Cir. 1949) ("Although a libel of information is used to prosecute a seizure for condemnation on land, it is a common law case in which a jury trial is a constitutional right."); *One Plymouth Automobile v. United States*, 165 F.2d 186, 187 (5th Cir. 1948) ("[i]n common law cases involving over $20, a jury trial is a constitutional right; and from the beginning it has been established that, though all seizures for forfeitures are to be prosecuted by libel *in rem* according to admiralty practice, seizures on land are not admiralty cases but *common law informations*, in which a jury trial is demandable") (emphasis in original). *See generally* 5 J. Moore, Federal Practice, ¶38.12[1] at 128.24 (1971 ed.).

Finally, an administrative adjudication for an OSHA civil penalty results strictly in liability for a money judgment, on which the Government may levy execution like any other money judgment recovered in a suit at law. *See Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891) *quoted with approval* in *Pernell v. Southall Realty, supra*, 416 U.S. at 363, 370 (1974). As Judge Gibbons' extensive analysis in his panel dissent in the *Irey* case below demonstrates, "... [N]o case in the Supreme Court has ever sustained the imposition of an *in personam* judgment for a civil penalty in a

proceeding in which the defendant claimed and was denied the right of jury trial guaranteed by the Seventh Amendment." (Irey Cert. App. at 24b).[22]

C. The Seventh Amendment Applies to Administrative Monetary Penalty Adjudications.

1. The Rulings of the Lower Courts

Thus, if Congress had, in the OSHA scheme, provided for initial enforcement proceedings for OSHA's monetary penalties in the United States District Court rather than an administrative forum (or alternatively, allowed *de novo* judicial review after the administrative proceeding) it is incontestable that the defendant would have a right to a jury trial under the Seventh Amendment. The sole basis for exempting the OSHA civil penalty from the "traditional accoutrement [of] the right to a jury trial of fairly disputed issues of fact" which accompanies the "historic remedy of a civil penalty for [statutory] violations . . . ." *United States v. J. B. Williams, supra,* 498 F.2d at 426, is that this time

[22]The panel majority in *Irey* relied, *inter alia,* on *Oceanic Steam Navigation Co. v. Stranahan,* 214 U.S. 320 (1909) and *Hepner v. United States,* 213 U.S. 103 (1909). *See* Irey Cert. App. at 7b; 8b n. 11. These cases are distinguished by Judge Gibbons at Irey Cert. App. 18b-24b. We note in addition to Judge Gibbons' analysis that both cases rest on the extraordinary and special congressional powers involved in revenue collection and immigration. *Cf.* Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973) (Powell, J., concurring); Curtis v. Loether, *supra,* 415 U.S. at 198 n. 15.

Congress departed from its prior almost uniform legislative policy of respecting the established Seventh Amendment jury right (*see* pp. 83-84 *infra*) and chose instead to place the initial enforcement proceeding in a federal administrative forum with limited judicial review.

As the Court in *Rogers v. Loether, supra,* 467 F.2d at 116 n. 19 observed, *quoting from Minneapolis & St. L.R.R. v. Bombolis,* 241 U.S. 211, 219 (1916) "The Seventh Amendment is controlling upon Congress." The issue, then, which this Court must resolve in the instant cases, is whether Congress may – consistent with the Seventh Amendment – eliminate a constitutionally protected civil jury trial right in civil penalty cases simply by substituting an administrative tribunal for a United States District Court in a particular civil penalty proceeding.

The Third Circuit's *en banc* majority opinion in the *Irey* case, relying principally on *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937) resolved this issue in favor of the government by holding squarely and unequivocally that the Seventh Amendment is generally not applicable to administrative proceedings (Irey Cert. App. at 4a):

> "[I]f the proceeding is before an administrative agency rather than in the courts, the Supreme Court has held that the Seventh Amendment does not apply."

The whole of the Third Circuit's analysis is set forth in the following passages (*id.* at 8a-9a)

> "Nevertheless, it would seem that reliance upon the claimed equitable coloration of the Occupational Safety and Health Act obscures the simple

fact that this is an administrative adjudication. The Supreme Court's rulings to date leave no doubt that the Seventh Amendment is not applicable, at least in the context of a case such as this one, and that Congress is free to provide an administrative enforcement scheme without the intervention of a jury at any stage.

"The petitioner likens the assessment of these OSHA civil penalties to an *in personam* monetary judgment which can be obtained only in an action at law. But that similarity has not proved decisive to the Supreme Court. *Curtis v. Loether, supra,* at 196. We see no difference in the impact on an employer between an administrative award which requires him to pay a fixed sum of money to certain employees as in the *Jones & Laughlin* case and one which orders payment of a civil penalty to the United States.

"Our function is not to pass upon either the wisdom or desirability of such an administrative adjudicatory process. We are limited to deciding whether it is constitutional within the limitations set by the Supreme Court.[9]

> "There is a line beyond which Congress may not transfer traditional remedies from the courts to administrative agencies so as to evade the protection of the Seventh Amendment.[10] As so often with constitutional adjudications, such a point need not be defined with precision to cover all cases for all time. We only decide the case before us, and, as the panel previously held, that line has not been crossed in this case. . . ."

The Fifth Circuit's reasoning on the Seventh Amendment claim in the *Atlas* case below is essentially the same as the Third Circuit's (Atlas Cert. App. at 25a):

"Failing the Sixth Amendment and Article III hurdle, Atlas further argues that even if the penalties are termed civil, the Seventh Amendment requires that Congress provide a system of enforcement that gives employers the opportunity to put their case before a jury in a de novo proceeding in the District Court.[56] As support, Atlas cites *United States v. J.B. Williams Co.*[57] in which the Second Circuit held that a defendant had the right to a trial by jury in an action brought by the Attorney General in the District Court under 15 U.S.C.A. §56 for violations of an F.T.C. cease-and-desist order, and the dissenting opinion of Judge Gibbons in *Frank Irey, Jr., Inc. v. OSHA, supra. Williams,* however, is readily distinguishable for there the only means of statutory enforcement was by way of the federal courts. Where adjudicative responsibility rests only in the administering agency, 'jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the [agency's] role in the statutory scheme.' *Curtis v. Loether,* 1974, 415 U.S. 189; see also *Pernell v. Southall Realty,* 416 U.S. 363, 94 (1974). The Second Circuit in *Williams* was cognizant of this distinction and held merely that where the United States brings a traditional civil suit in the District Court juries must be provided.

"That the civil sanction under attack is in the form of a dollar penalty is not a sufficient distinction to deny the power of Congress to prescribe an administrative, as distinguished from a judicial mechanism. To so hold would produce the absurd spectacle of Congress – having the full power to prescribe an administrative structure with sanctions of denial or revocation of a life-or-death license (see the large number of such statutes at note 43, *supra*) – being denied the power to prescribe a money fine of a single dollar or for that matter a single red sou."

The broad sweep of the holdings below[23] is not surprising since established Seventh Amendment case law forecloses every other avenue which might be advanced to justify rejection of the Seventh Amendment claim in these cases. *See* pp. 65-71 *infra*. But, as the four dissenting judges in the *Irey* case below recognized (Irey Cert. App. at 12a-14a) these decisions generate a most fundamental Article III separation of powers issues – *i.e.*, under the Constitution is Congress or this Court the final arbiter of the reach of the Seventh Amendment?

2. The Jones & Laughlin Case.

The principle basis for the position that the Seventh Amendment has no application generally to administrative adjudications is the two paragraphs appearing at the

[23]We note that the logic of the Fifth Circuit's "single red sou" argument is to treat the Seventh Amendment itself as an "absurd spectacle". For that Amendment prohibits Congress from allowing a federal district judge to compel a citizen to submit for his sole determination factual disputes involving twenty dollars or more, while allowing Congress to permit the same judge to compel Standard Oil Company to submit to a federal judicial determination of the question whether or not that huge company may even continue to exist. The point is that whatever legitimate control Congress may have under Article III and the Seventh Amendment over the allocation of functions between federal judges, juries, and administrative law judges must rest on the type of sanction or remedy involved, and not on a comparison of severity of possible remedies in individual cases plucked from different categories or types of remedies. *Cf.* 1 K.C. Davis, Administrative Law Treatise §2.13, at 134 (1958 ed.) ("An agency in revoking a license may exercise a power of life and death over a valuable business, but ordinarily it may not impose a ten-dollar criminal fine.")

end of the Court's opinion in *NLRB v. Jones & Laughlin*, 301 U.S. 1, 48-49 (1937) (Hughes, C.J.) wherein the Court rejected the contention that the Seventh Amendment applies to an NLRB back-pay order (emphasis added):

> "Respondent complains that the Board *not only ordered reinstatement but directed the payment of wages for the time lost by the discharge, less amounts earned by the employee during that period.* This part of the order was also authorized by the Act. §10(c). It is argued that the requirement is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury. The Seventh Amendment provides that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' The Amendment thus preserves the right which existed under the common law when the Amendment was adopted. *Shields v. Thomas*, 18 How. 253, 262; *In re Wood*, 210 U.S. 246, 258; *Dimick v. Schiedt*, 293 U.S. 474, 476; *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657. *Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. Clark v. Wooster*, 119 U.S. 322, 325; *Pease v. Rathbun-Jones Engineering Co.*, 243 U.S. 273, 279. It does not apply where the proceeding is *not in the nature of a suit at common law. Guthrie National Bank v. Guthrie*, 173 U.S. 528, 537.
>
> "*The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding.* Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies

appropriate to its enforcement. The contention under the Seventh Amendment is without merit."

But these portions of the opinion, when read in context and in light of the authorities cited, hold only that the Seventh Amendment does not foreclose a tribunal exercising powers in the nature of equitable remedies from awarding incidental monetary relief, because proceedings before such a tribunal are not in the nature of common law proceedings any more than suits to enforce claims against the sovereign (which depends strictly on a waiver of sovereign immunity) can be considered suits in the nature of a suit at common law.

Thus, the immediately preceding paragraph of this Court's opinion in *Jones & Laughlin* sustains the reinstatement remedy of the NLRB on the reasoning that this remedy is simply a legislative analogue to the judicial equitable remedial power to order "restoration to service" in contempt proceedings for violation of an injunction, 301 U.S. at 47-48 (emphasis added):

> "The order of the Board required the reinstatement of the employees who were found to have been discharged because of their 'union activity' and for the purpose of 'discouraging membership in the union.' That requirement was authorized by the Act, §10 (c). In *Texas & N.O.R. Co. v. Railway Clerks, supra*, a similar order for restoration to service was made by the court in contempt proceedings for the violation of an injunction issued by the court to restrain an interference with the right of employees as guaranteed by the Railway Labor Act of 1926. The requirement of restoration to service, of employees discharged in violation of the provisions of that Act, was thus a sanction imposed in the enforcement of a judicial

> decree. *We do not doubt that Congress could impose a like sanction for the enforcement of its valid regulation. The fact that in the one case it was a judicial sanction, and in the other a legislative one, is not an essential difference in determining its propriety. . . .*"

It is this passage which provides the lead-in for the first sentence of the two paragraphs dealing with the Seventh Amendment issue (emphasis added):

> "Respondent complains that the Board *not only ordered* reinstatement but directed the payment of wages for the time lost by the discharge, less amounts earned by the employee, during that period . . . ."

Having just sustained the Board's reinstatement power as a legislative analogue to judicial equitable remedial powers, the totally dispositive answer to this question is the precise answer the *Jones & Laughlin* Court gave, which was then one of the most familiar, black letter law propositions regarding equitable remedies: *i.e.*, a court in equity may award money damages as

> "an incident to equitable relief even though damages might have been recovered in an action at law. Clark v. Wooster, 119 U.S. 322, 325; Pease v. Rathbun-Jones Engineering Co., 243 U.S. 273, 279."

Since, as the *Jones & Laughlin* Court states in the immediately preceding sentence, the "Seventh Amendment . . . preserves the right which existed under common law when the amendment was adopted" – and since the opinion has just established that the NLRB proceeding is a legislative analogue to a judicial

equitable proceeding – it follows that the Seventh Amendment is not applicable to this award of monetary relief because the NLRB proceeding "is not in the nature of a suit at common law." *Guthrie National Bank v. Guthrie*, 173 U.S. 528, 537 (1899)."

That the opinion up to this point in no way relies on the *nature of the tribunal Congress set up* in the Wagner-Connery Act 49 Stat. 449 *et seq.* is further demonstrated by a reading of *Guthrie National Bank v. Guthrie, supra.* The *Guthrie* case arose on review of a District Court decision invalidating a statute of the territorial legislature of Oklahoma authorizing the territorial District Court to appoint three persons to act "as a commission or referees" (173 U.S. at 530 asterik footnote, section 1 of the statute) to "inquire into an pass upon" (*id*) all claims for indebtedness arising out of actions of the provisional government of the villages of Guthrie which preceded the statutory creation of the City of Guthrie as a permanent municipality. 173 U.S. at 529. The statute directed the "commission or referees" to report their findings on all claims allowed or disallowed" for approval or disapproval of the District Judge." 173 U.S. at 534 asterik footnote, section 4 of the statute. The City Council of Guthrie was then directed to tax each of the four subdivisions to pay the claims allowed by the District Judge in proportion as the claims were derived from actions of that subdivision's provisional government. *Id.*

The statute thus authorized compulsory taxation to pay (173 U.S. at 534):

> "claims against a municipal corporation, which have no legal obligation, and which therefore could not be enforced in a court, but which the legislature thinks have a sufficient equity and are based upon a sufficiently strong moral obligation to make it proper for it to provide for their investigation and for the payment of such as are decided to be proper, by taxation upon the property situated in the city."

As the *Guthrie* court stated (173 U.S. at 534) (emphasis added):

> "The important question in this case is whether the territorial legislature by virtue of the grant to it of legislative powers had authority to create this commission and to provide for the payment of claims *of the nature* mentioned in the act."

And the *Guthrie* Court's answer was (173 U.S. at 535-37) (emphasis added):

> "In *United States v. Realty Company*, 163 U.S. 427, 439, the power of Congress to recognize a moral obligation on the part of the nation and to pay claims which, *while they were not of a legal character, were nevertheless meritorious and equitable in their nature*, was affirmed. The territorial legislature at least had the same authority as that possessed by Congress to recognize claims *of the nature* described. It is a legislative power, and it was granted to the territorial legislature by the acts already referred to. A city is a municipal corporation and a political subdivision of the State, and what the State could do itself it has the power to direct its agent, the municipality, to do.
>
> * * * *
>
> ". . . . In the exercise of this jurisdiction over municipal corporations by the state or by the territorial legislature, no constitutional principle is violated. It is a jurisdiction which has been customarily exercised ever since the foundation of

the government, and is based upon the power of the State as sovereign to itself recognize or compel any of its political subdivisions to recognize those obligations which, *while not cognizable in any court of law* are yet based upon considerations so thoroughly equitable and moral as to deserve and compel legislative recognition."

This holding on the major issue in the case is then immediately followed by the *Guthrie* Court's rejection (in language strikingly parallel to the *Jones & Laughlin* opinion) of the City of Guthrie's claim that its Seventh Amendment rights were violated by the statute (173 U.S. at 537-38) (emphasis added):

"There is no force to the objection that in ascertaining the facts provision must be made for a trial by jury, if demanded, or else that the Seventh Amendment to the Constitution of the United States is violated, which provides that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.'

"This Act does not infringe upon that amendment. *The proceeding under it is not in the nature of a suit at common law and the cases already cited show the power of the legislature to provide for payment by taxation of claims of the nature of those involved herein.*"

The holding of *Guthrie*, then, on the Seventh Amendment issue, was that a claim against the sovereign was not in the nature of a suit at common law within the meaning of the Seventh Amendment, another familiar black-letter law proposition of this Court's Seventh Amendment jurisprudence. *McElrath v. United States*, 102 U.S. 426, 440 (1880). *See also Galloway v. United States*, 319 U.S. 372, 388 (1943). That holding,

as the plurality opinion in *Glidden v. Zdanok*, 370 U.S. 530, 572 (1962) states, in no way turns upon the "legislative" or "statutory" nature of the tribunal (emphasis added):

"A preliminary consideration that need not detain us long is the absence of provision for jury trial of counterclaims by the Government in actions before the Court of Claims. Despite dictum to the contrary in *United States v. Sherwood*, 312 U.S. 584, 587, *the legitimacy of that nonjury mode of trial does not depend upon the supposed 'legislative' character of the court. It derives instead, as indeed was also noted in Sherwood, ibid., from the fact that suits against the Government, requiring as they do a legislative waiver of immunity, are not 'suits at common law' within the meaning of the Seventh Amendment. McElrath v. United States*, 102 U.S. 426, 439-440. The Congress was not, therefore, required to provide jury trials for plaintiffs suing in the Court of Claims; the reasonableness of its later decision to obviate the need for multiple litigation precludes a finding that its imposition of amenability to nonjury set-offs was an unconstitutional condition. *Cf., Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211; *see* 74 Harv. L. Rev. 414, 415 (1960)."

See also H. Hart & H. Wechsler, *The Federal Courts and the Federal System* 399-400 (2d. ed. 1973).[24]

The *Jones & Laughlin* opinion, then, up to the end of the first paragraph dealing with the Seventh Amendment issue, in no way relies on the administrative nature of the tribunal as a basis for rejecting the Seventh Amendment claim. The second paragraph then states (emphasis added):

> "The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit."

[24]That the *Guthrie* Court's holding in no part rested on the nature of the tribunal (*i.e.*, "commission or referees") but rather exclusively on the nature of the claims is also shown by the Court's rulings: (1) that even if the Act allowed *no* judicial investigation whatsoever it would be constitutional (173 U.S. at 538); (2) the Act in no way regulates "the practice in courts of justice" because the claims rest only on moral obligations (173 U.S. at 534); (3) in any event the Act does allow the District Court "to investigate for itself the facts upon which the claims were founded" (173 U.S. at 538) and "these facts may be found by the court without a jury" (173 U.S. at 539). As the *Guthrie* court well knew, the Seventh Amendment applied to the territorial courts, *Webster v. Reid*, 52 U.S. [11 How.] 437, 460 (1851); *Kennon v. Gilmer*, 131 U.S. 22, 28 (1889), despite the fact that these were then viewed as "legislative courts" incapable of receiving Article III judicial powers. *American Insurance Co. v. Canter*, 26 U.S. [1 Pet.] 511, 546; *Glidden v. Zdanok*, *supra*, 370 U.S. at 544-45. *See also Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211, 219 (1911).

Practically the whole basis for the third circuit *en banc* majority's reading of *Jones & Laughlin* (and thus its holding below) turns on this paragraph and particularly on the two words "statutory proceeding." But the Court could not conceivably have meant in any sense to broaden the meaning of the first paragraph to rest the disposition as well on the administrative nature of the tribunal.

First, the critical portion of the disjunctive in the first sentence of this second paragraph – *i.e.*, "or in the nature of such a suit" carries directly over from the *Guthrie* citation and as such, obviously goes no further in content than *Guthrie* itself.

Second, the context of the entire opinion shows that the phrase "statutory proceeding" is surely intended to restate for clarification the legislative-judicial equity analogue which forms the essential basis for the entire holding. Thus: (a) in the discussion of the NLRB's reinstatement power the Court squarely rejects a "legislative-judicial" distinction based on the nature of the tribunal ("the fact that in the one case it was a judicial sanction, and on the other a legislative one, is not an essential difference in determining its propriety," *see* pp. 48-49 *supra*); (b) no mention in the entire Seventh Amendment discussion is made of the NLRB as an "administrative agency" despite that choice of characterization earlier in the opinion with respect to the constitutionality of the NLRB's procedures (301 U.S. at 48); and therefore (c) the most natural interpretation of the term "statutory proceeding" in total context is simply to reiterate the "legislative" equitable remedy analogue as the basis for asserting that

"the proceeding is one unknown to the common law."[25]

We believe the foregoing discussion demonstrates – even without appeal to the broader questions of constitutional policy underpinning the Seventh Amendment and Article III of the Constitution – that the *Jones & Laughlin* opinion simply cannot be read as standing for the general proposition that the Seventh Amendment has no applicability to administrative adjudications. But far more fundamental for the disposition of this case are the implications of the lower courts' rationale for the role of the federal courts in the American system of constitutional government as that role is related to the Seventh Amendment. As the *en banc* dissent in the *Irey* case pointed out, the critical feature of the holding below is that in effect "Congress can by fiat define the term 'administrative adjudication' and thereby necessarily define the Seventh Amendment term 'Suits at common law' . . . ." thus effectively eliminating the federal courts from any meaningful participation in defining the scope of the Seventh Amendment (Irey Cert. App. at 12a-14a) (footnotes omitted):

> " . . . Thus, I assume, as does the common consensus, that the seventh amendment applys to the entire judicial power of the United States to the extent that the exercise of that power involves suits at common law. I also assume, and I do not suppose the majority disagrees, that the seventh amendment binds the entire federal government,

[25]We note that there isn't a single citation in the second paragraph. If the Court had intended in any sense (holding, alternative holding or dictum) to state a rationale different from the first paragraph (every step of which carries a citation) the Court would not have done so without a single authority.

> not merely the Article III courts. I also assume that Congress could not confer the entire diversity jurisdiction, including suits at common law, upon a non-Article III tribunal sitting without a jury. Nor, I suppose, would the case be different if Congress called those non-Article III adjudicators 'administrators' rather than 'judges.'
>
> "But if the majority is right about this case, then my last two assumptions are dead wrong, for nothing in the majority opinion gives any definition to the term 'administrative adjudications' other than to simply recognize the label which Congress has fastened upon it. Indeed, that is precisely the government's position. When at oral argument the attorney appearing for the government was asked to suggest a standard by which an 'administrative proceeding' falling outside the reach of the seventh amendment could be identified, the only standard he could suggest was the label Congress attached. The majority opinion although it gives passing lip service to the principle of judicial review, embraces this position by totally omitting any attempt to give content either to the seventh amendment term 'Suits at common law' or to its term 'administrative adjudication.' The extent of its analysis is in three sentences:
>
> > 'There is a line beyond which Congress may not transfer remedies from the courts to administrative agencies so as to evade the protection of the Seventh Amendment. As so often with constitutional adjudications, such a point need not be defined with precision to cover all cases for all time. We only decide the case before us, and, as the panel previously held, that line has not been crossed in this case.'
> >
> > (Majority opinion at 10) (footnote omitted).
>
> "But how do we know the line has not been crossed if we are not told where it is? What

neutral principle was brought to bear in deciding that this case fell on the permissible side of the invisible line? There is only one discernible to me in the majority's opinion – that urged by the government. The line is wherever Congress says it is.

"If this is the teaching of the one authority upon which the majority relies, then unbeknownst to the world of legal scholarship, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), affected the most profound and enormous redistribution of power among the three branches of the federal government of any case in the Court's history. I had thought until today that the Court, not Congress, was the final arbiter of the lines drawn in the Constitution. But if Congress can by fiat define the term 'administrative adjudication' and thereby necessarily define the seventh amendment term 'Suits at common law', what role do the Article III courts play? I have already referred to the possibility of administrative diversity cases. Can Congress, acting under its commerce clause powers refer all contract cases affecting interstate commerce to an 'administrative' non-jury adjudicator? And in a sixth amendment context, can Congress 'decriminalize' a whole range of conduct and refer enforcement of federal policies to an administrative civil commitment agency? Think of the judicial resources that would have been saved had that approach been taken during the Vietnam War with respect to the Selective Service Act. It is true, of course, that in either a sixth or a seventh amendment context, the elimination of a jury trial would still leave operable the due process protection of the fifth amendment. Thus some form of judicial review would remain. But my point is that whether we are dealing with the sixth amendment guaranty of a jury trial 'in all criminal

prosecutions', or with the seventh amendment guaranty of a jury trial '[i]n Suits at common law,' the constitutional scheme of things requires that the Court, not Congress, give meaning to the constitutional terms, and thereby define the limits of administrative proceedings."

The failure of the Third Circuit *en banc* majority to articulate a "line" – in the sense of principled basis for its reading of *Jones & Laughlin* which suggests the limits as well as the reach of its holding – highlights the fundamental danger of reading that case "for all it might be worth rather than the least it has to be worth. . . ." *Cf.* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1364 (1953). In the face of such a holding there is no "functional" approach whereby this Court can in the future restrict Congress's exercise of its putative legislative discretion to bypass the Seventh Amendment by shifting some or all of the business of the federal judiciary to administrative adjudicators. For example, is there any formulation of the type of policy arguments that might be tendered by the government in justification for the OSHA non-jury administrative adjudicator which would not also be applicable practically ipso facto (if not a fortiori) to every single governmental civil penalty action presently carrying a Seventh Amendment right to trial by jury? Moreover, is there any significant subcategory of cases presently arising under the federal question jurisdiction (28 U.S.C. §1331) as to which a similar set of legislative policy justifications might not be tendered under the sort of standard this Court frequently applies to test the empirical rationality of a congressional statement of

purposes in the face of a constitutional challenge to the validity of a statute?[26]

[26]In addition to the substantive categories of cases listed in *Curtis v. Loether*, *supra*, 415 U.S. at 193-94, consider the constitutionality under a functional approach of an amendment to 28 U.S.C. §1331 that would place all federal question cases where the amount in controversy is between $10,000 and $100,000 in the hands of non-jury administrative adjudicators. Would such a statute – if presaged by congressional findings relating to crowded dockets, speed of remedy, etc. – be demonstrably irrational under, for example, the judicial review standard for testing the reach of Congress's power to regulate interstate commerce? *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253-58 (1964).

Nor are we dealing with mere academic "hypothetical horribles" here. As the Fifth Circuit in the *Atlas* case observed (Atlas Cert. App. at 6a) (emphasis in original):

> ". . . [t]he streamlined enforcement procedure embodied in OSHA, although presently prescribed in only a few instances, has been recommended as a blueprint for a major revision of the enforcement systems of all federal agencies."

See Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1972) 900-01, cited at footnote 11 of the Fifth Circuit's *Atlas* opinion and discussed herein at pp. 83-84 *infra*.

Of course we do not concede that the applicable judicial standard on such a functional approach would be the "rational relation" test. Indeed, considering that we are dealing with a federal statute encroaching on a specific constitutional policy interest embodied in an Amendment intended to check the majoritarian will as expressed in Congress, it would be necessary on any functional theory to apply a strict scrutiny-type standard to test the empirical basis of such statutes. *See generally* Dandridge v. Williams, 397 U.S. 471, 484-85 (1970). *See also* pp. 73-74 *infra*.

We note that here the Court is dealing with "the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure," *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) *quoted with approval* in *Colgrove v. Battin*, *supra*, 413 U.S. at 156. Thus, the problem is not merely a "line drawing" problem of stating "with precision to cover for all time" a "point" "beyond which Congress may not transfer remedies from the courts to administrative agencies so as to evade the protection of the Seventh Amendment" "as [is] so often the case with constitutional adjudications." See the *en banc* majority decision in *Irey*, Irey Cert. App. at 9a. Where the issue is congressional discretion over a formal attribute of the common law jury not traceable to a constitutionally-based policy interest or a significant historical policy embodied in the Seventh Amendment, it may be proper to decline to choose in advance the numerical stopping point the federal courts will impose to avoid falling off the "slippery slope." *See, e.g., Williams v. Florida*, 399 U.S. 78, 91 n. 28 (1970). But such a judicial approach is not transferrable to the very different task of describing meaningful boundaries on Congress's power to transfer Seventh Amendment business to administrative forums.

We submit that if, as this Court recently reaffirmed (*United States v. Nixon*, 418 U.S. 683, 703-05 (1974)) "It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) that duty cannot be met by a judicial sanction of congressional power generally to redelegate cases otherwise covered by the Seventh Amendment to nonjury administrative

adjudicators where no principled limitation on the congressional power so recognized is set forth.

The *Jones & Laughlin* case, then, does not support the contention that Congress may displace the Seventh Amendment jury right simply by designating an administrative tribunal as the locus of trial for an action which would otherwise be triable to a jury as a matter of constitutional right. Nor do the cases of *Block v. Hirsh*, 256 U.S. 135 (1921), *Curtis v. Loether*, *supra*, or *Pernell v. Southall Realty*, *supra*, justify this conclusion.

Thus, in *Block v. Hirsh*, *supra*, this Court sustained a temporary statute based on an emergency housing shortage resulting from World War I which abolished the substantive legal right of a landlord to throw his tenant out after the expiration of his lease and gave the tenant a legal right to hold over on the terms of either the old lease or new terms specified by a rental commission. 256 U.S. at 153-54. In place of the landlord's former right to regain possession upon expiration of the lease, the statute accorded him a right to possession only for his own or his family's personal occupancy upon thirty days notice. The *Block* Court (in a 5 to 4 decision) sustained the power of Congress to thus displace the substantive rights of landlords to choose their tenants and negotiate their own lease terms as a reasonable police power regulation in light of the housing emergency, noting that "a limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change." 256 U.S. at 157. The Court then disposed of the Seventh Amendment contention in the following paragraph (256 U.S. at 158) (emphasis added):

> "The statute is objected to on the further ground that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land. If the power of the commission established by the statute is established, as we think it is, by what we have said, this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable. *While the act is in force there is little to decide except whether the rent allowed is reasonable, and upon that question the courts are given the last word. A part of the exigency is to secure a speedy and summary administration of the law, and we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision of a statute reasonable in its aim and intent . . . .*"

Thus, the *Block* Court's stated rationale for the Seventh Amendment disposition was that (a) the power in the Commission effectively to set the terms and conditions of the leasehold left "little to decide" in a possessary action and, in any event (b) in the emergency conditions addressed by the act "we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision of a statute reasonable in its aim and intent." *Id.* The one thing the *Block* Court did *not* say was that Congress's power to enact a temporary "suspension of ordinary remedies" was dependent on its choice of an administrative forum opposed to a judicial forum for setting the terms of the landlord-tenant relationship in the emergency.

Curtis v. Loether, *supra*, and *Pernell v. Southall Realty*, *supra*, reiterate the established definition of the Seventh Amendment phrase "common law" set forth in this Court's decisions in *Parsons v. Bedford*, *supra*, and

Whitehead v. Shattuck, *supra*,[27] and then hold the Seventh Amendment *is* applicable to, respectively, a damage action under Title VII of the Civil Rights Act of 1968 in the Federal District Court and a suit for possession of land in the Superior Court of the District of Columbia.[28] In the context of these holdings, as the

[27] *See* pp. 32-33 *supra*.

[28] The *Pernell* holding raises another problem with the broad reading of *Jones & Laughlin* in the *Irey* and *Atlas* cases. Thus, the District of Columbia Court Reform and Criminal Procedure Act of 1970, §111, D.C. Code §11-101, establishes that the Superior Court is exclusively an Article I or "legislative" court. See also the definition of "court of the United States" in 28 U.S.C. §451, which "as used in this title" limits the term to "any court created by Act of Congress, the judges of which are entitled to hold office during good behavior", a definition excluding the Superior Court. *See* D.C. Code §11-1502.

Yet the *Pernell* Court unhesitatingly reaffirmed its prior ruling in *Capitol Traction Co. v. Hof*, 174 U.S. 1, 5 (1889) that the Seventh Amendment "like other Provisions of the Bill of Rights . . . is fully applicable to Courts established by Congress in the District of Columbia." *See* Pernell, *supra*, 416 U.S. at 370. That ruling, of course, is perfectly consistent with the Seventh Amendment rule that the Seventh Amendment is applicable to tribunals such as the territorial courts. *See* note 24 *supra*.

But suppose Congress had included in the D.C. Court Reform Act a set of findings to the effect that landlord-tenant relations in the District demanded a speedy, efficient, expert set of adjudicators which, for convenience sake, would be set up as a specialized Division of the Superior Court to be labelled the "Landlord-Tenant Administrative Tribunal Division." Would that provision have led to a different result in the *Pernell* case? If not, then the reason must be because the constitutional "legitimacy of that nonjury mode of trial does not depend on the supposed [administrative or] 'legislative' character of the court [or "tribunal"]." *Cf. Gliddon v. Zdanok*, *supra*, 370 U.S. at 572.

More generally, what is it that, for Seventh Amendment purposes, distinguishes an administrative adjudicator whose decision must be based exclusively on "the record" to consist of "the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding" (*see* Administrative Procedure Act §7, 5 U.S.C. §§556(d)-(e)) from the Superior Court as a "court of record," *see* D.C. Code §11-901?

Third Circuit *en banc* dissent observes (Irey Cert. App. at 15a-16a):

> "In each case the Court distinguished *Jones & Laughlin* which was raised as a bar to jury trial, as an administrative proceeding. But neither case can be read for the proposition that by calling something an "administrative adjudication" Congress can decide to handle "Suits at common law" without jury trials. No more could have been intended by these distinguishing references to *Jones & Laughlin* than to decide the Court's approval of congressional delegation of Article I power to an administrative agency in cases in which that procedure is constitutionally permissible. As I said in dissenting from the panel decision, there is no constitutional prohibition against referring matters of an equitable nature to an administrative fact-finding tribunal, and back pay incidental to injunctive relief is a traditional equitable remedy. The approving citation of *Whitehead v. Shattuck* in *Pernell v. Southall Realty*, quoted earlier, should dispel any notion that the Court reads *Jones & Laughlin*, as a major surrender of the power of judicial review."

3. The Equitable Remedy Analogy

The OSHA civil penalty scheme is not sustainable on the general theory that the Seventh Amendment has no application to administrative adjudications. Nor can the OSHA scheme be sustained on the government's theory that the penalty is either equitable in nature in light of the Act's enforcement purposes or somehow "ancillary" to administrative abatement orders. *See* Gov. Br. Opp. to Cert., No. 75-748, at 14.

First, if the equity analogy had any force whatsoever here, it would mean that Congress could, consistent with the Seventh Amendment, delegate the entire

OSHA enforcement scheme straight to the "equity side" of the Federal District Courts, without any intervention by an administrative adjudicator. Moreover, if Congress's asserted deterrent purposes behind the OSHA civil penalty justify labelling the remedy "equitable" as opposed to "legal" then every "civil penalty" statute is equitable for Seventh Amendment purposes, regardless of the congressional choice of forums. Neither proposition is tenable. *See* pp. 32-42 *supra*.[29]

[29]Thus, the *en banc* majority in *Irey* expressly declined to place its holding on the "claimed equitable coloration of the Occupational Safety and Health Act . . . ." Irey Cert. App. at 8a.

The *Irey en banc* majority states that this Court's decision in *Katchen v. Landy*, 382 U.S. 323, 327-29 (1966) "is consistent with the treatment accorded administrative determinations in [*Jones & Laughlin*] and furnishes some support for the Secretary's effort to drape the cloak of equity over OSHA's shoulders." *Id.* at 8a.

But the *Katchen* case rests its Seventh Amendment holding squarely on the incontestable status of Bankruptcy Courts as courts of equity and sustains the Bankruptcy Court's power to order return of a preference strictly on the equitable cleanup doctrine. 382 U.S. at 336-38. The passages from *Katchen* quoted in the majority *en banc Irey* decision respecting the Act's purpose to secure a prompt remedy relate to the construction of the statute respecting the Bankruptcy Court's jurisdiction (382 U.S. at 327-29) and were not invoked to justify "equitable coloration" of the incidental remedy for purposes of Seventh Amendment law.

Indeed, since the *Katchen* court observes that " . . . [P]etitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the Trustee . . . ." 382 U.S. at 336, and squarely places its statutory construction rationale on "the traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering proof of claim and demanding its allowance must abide by the consequences of that procedure," 382 U.S. at 332-33 n. 8, *quoting from Wisswall v. Campbell*, 93 U.S. 347, 351 (1876). *Katchen* would appear on balance to support the Seventh Amendment claim of an involuntary defendant in a civil penalty proceeding.

Second, under the statutory scheme Congress has created, the civil penalties imposed by the Act are in no sense "ancillary" to "the Congressional purpose [of] the swift securing of administrative abatement orders, which are equitable . . ." (Govt. Opp. Cert., No. 75-748, at 14). Thus, the statute provides separately for different penalties for (a) past violations of the Act, punishable by civil penalties of up to $10,000 "for each violation" depending upon the classification of the violation as non-serious, serious, or willful (*see* Section 17(a)-(c), 29 U.S.C. §§666(a)-(c), Irey Cert. App. at 17e and (b) penalties of up to $1,000 "for each day" for failure to correct a violation within the time period specified. §17(d), 29 U.S.C. §666(d), Irey Cert. App. at 17e. Separate administrative proceedings are provided for failure to correct a violation, which are initiated by a separate notice which starts anew the time limits within which the employer may serve his notice of intention to contest. Act, §10(b), 29 U.S.C. §659(b), Irey Cert. App. at 12e. To coerce compliance with these abatement orders, Congress added the unique Draconian touch of authorizing the Secretary "to retroactively assess non-abatement penalties from the date of citation if it finds that the employer-initiated review was not in good faith or was initiated soley for delay or avoidance of penalties." *Sheehan v. OSHRC*, 520 F.2d 1036 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3531 (1976); *see* Act, §17(d), 29 U.S.C. §666(d), Irey Cert. App. at 17e.[30]

[30]Indeed, with respect to "equity", and remedies ancillary to abatement problems, the statute provides specially for District Court jurisdiction under Rule 65 "upon petition of the Secretary" to restrain conditions of danger involving serious risks. *See* Act, §§13(a)-(d), 29 U.S.C. §§662(a)-(d), Irey Cert. App. at 16e.

Most fundamentally, correction of the alleged violation by the OSHA defendant in no way relieves him of a single cent of his liability for the civil penalty assessed pursuant to the administrative proceedings spelled out in Section 10(a) of the Act, 29 U.S.C. § 659(a), Irey Cert. App. at 12e. Conversely, if the employer were to refuse to pay the penalty, it is recoverable only in a separate civil action filed in the United States District Court, leading to an in personam money judgment upon which execution issues exactly like any other civil debt owed any judgment creditor by any judgment debtor. *See* Act, § 17(k), 29 U.S.C. § 666(k), Irey Cert. App. at 18e. Assuming, as in these cases, the employer is only cited for past violations and not for notice of failure to correct,[31] there is nothing whatsoever to which the civil penalties the employers must pay can be said to be "ancillary."

4. The Statutory Source of the Legal Duty

The Government's Brief in Opposition to Irey's Petition for Certiorari suggests a narrower ground for affirmance (Br. in Opp. No. 75-748, at 14) (footnote omitted):

> "These cases [*i.e.*, *NLRB v. Jones & Laughlin Steel Corp.*, *supra*; *Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Curtis v. Loether*, *supra*; *Block v. Hirsh* 256 U.S. 135 (1920), all discussed at pp. 46-65 *supra*] merely restate the settled rule that

[31] *See* Irey Citation for Serious Violation, J. App. at 6a-13a; Atlas Citation for Serious Violation, J. App. at 26a-30a.

> the legislature may abolish a common law remedy and substitute an analogous administrative remedy with no resort to a jury.
>
> "*A fortiori*, Congress may create rights and obligations unknown at common law and establish an expert administrative tribunal to enforce those rights . . . ."

Since there is no question here that the "remedy" [*i.e.*, personal liability for a monetary civil penalty for violating a statute] was "known at common law" in every possible sense of that phrase, the argument must be that the Seventh Amendment is inapplicable to OSHA because the employer's primary duty to provide a safe workplace and otherwise obey OSHA regulations is founded on a federal statute.[32] But this Court

[32] In addition to *Block v. Hirsch*, *supra*, the government, at footnote 7 in the quoted passage, relies on this Court's decision in *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) for the proposition that "Congress may abolish a common law remedy and substitute an analogous administrative remedy with no resort to a jury." In *Mountain Timber* this Court rejected a claim that the Seventh Amendment prohibited the State of Washington from abolishing an employer's liability for negligence under the common law and substituting a state fund for no fault compensations under state administrative jurisdiction with limited judicial review. (*See* 243 U.S. at 228-34). As the *Mountain Timber* court made clear, the Seventh Amendment in no way prohibits any jurisdictions from eliminating altogether a pre-existing common law substantive theory of personal liability. 243 U.S. at 235 (emphasis added):

> "The 7th Amendment, with its provision for preserving the right of trial by jury, is invoked. It is conceded that this has no reference to proceedings in the state courts (Minneapolis & St. L. R.R. Co. v. Bombolis, 241 U.S. 211, 217), but it is urged that the question is material for the reason that if the act be constitutional it must be followed in the Federal courts in cases that are within its provisions. *So far as private rights of action are preserved, this is no doubt true; but, with respect to those, we find*

(Footnote continued on next page)

squarely rejected the same argument in *Curtis v. Loether, supra,* 415 U.S. at 193-94:

> "Petitioner nevertheless argues that the Amendment is inapplicable to new causes of action created by congressional enactment. As the Court of Appeals observed, however, we have considered the applicability of the constitutional right to jury trial in actions enforcing statutory rights 'as a matter too obvious to be doubted.' 467 F.2d at 1114. Although the Court has apparently never discussed the issue at any length, we have often found the Seventh Amendment applicable to causes of action based on statutes. *See, e.g., Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 477 (1962) (trademark laws); *Hepner v. United States,* 213 U.S. 103, 115 (1909) (immigration laws); *cf. Fleitmann v. Welsbach Street Lighting Co.,* 240 U.S. 27 (1916) (antitrust laws), and the discussion of *Fleitmann* in *Ross v. Bernhard,* 396 U.S. 531, 535-36 (1970).[7] Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the

(Footnote 32 continued from last page)

nothing in the act that excludes a trial by jury. As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury."

Nothing in *Mountain Timber* suggests that the Court there viewed the no-fault workman's compensation insurance scheme as somehow "analogous" to the common law damages remedy for negligence. Of course, we do not doubt that Congress may abolish the employer's Seventh Amendment jury right by abolishing the employer's substantive liability for violating the statute; beyond that, to the extent the principle of *Mountain Timber* has any relevance to the instant cases, the underlined passages argue for reversal of the rulings here, particularly in light of this Court's subsequent holding in *Byrd v. Blue Ridge Cooperative,* 356 U.S. 525, 533-40 (1958) that in an employee negligence diversity case in federal court, factual disputes over the availability to the defendant-employer under the state workman's compensation law of a substantive statutory defense had to be submitted to the jury.

statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."

II.

POLICY CONSIDERATIONS FAVOR RECOGNITION OF A RIGHT TO TRIAL BY JURY TO DETERMINE LIABILITY FOR AN OSHA CIVIL PENALTY BEFORE FINAL JUDGMENT

A. The Defendant's Right to a Jury Before Final Judgment Comes Within the Clear Command of the Seventh Amendment.

In evaluating the policy factors as they may relate to this Court's determination of the Seventh Amendment issue in these cases, two preliminary observations are in order.

First, as this Court observed in *Curtis v. Loether, supra,* 415 U.S. at 198, in connection with the argument that policy factors undergirding the Civil Rights Act of 1968 and the Thirteenth and Fourteenth Amendments to the Constitution justified non-recognition of a right to trial by jury in that case:

> "More fundamentally, however, these considerations are insufficient to overcome the clear command of the Seventh Amendment."[33]

[33]We note that insofar as the Civil Rights Act rests both on the very general commerce power delegation to the Congress and the specific enforcement powers delegated to Congress under the Thirteenth and Fourteenth Amendments, *see Curtis v. Loether, supra,* 415 U.S. at 198 n. 15, the policy considerations justifying overriding the jury right in the context of the Civil Rights Act would appear to have been stronger than any policy considerations that might be advanced in the context of the Occupational Safety and Health Act, which rests only on the commerce power. *See* Act, §8, 2(b), 29 U.S.C. §651, Irey Cert. App. at 1e.

See also United States v. J. B. Williams Co., supra, 498 F.2d at 428 ("The first point in response is that the footnote in *Ross v. Bernhard* [396 U.S. 531, 538 n. 10 (1970)] was part of an argument for applying the Seventh Amendment right to a jury trial where it had not been recognized before the merger of law and equity – not a suggestion that a type of statute which had uniformly been held to carry the right of jury trial should now be construed to eliminate it.")

Federal governmental statutory actions for civil penalties are – on the basis of some 200 years of practice in the federal courts, English common law, and the specific understanding of the authors of the Seventh Amendment and the First Judiciary Act – a classic illustration of a type of statute which had uniformly been held to carry the right of jury trial before the merger of law and equity under the Federal Rules of Civil Procedure. *See Ross v. Bernhard, supra,* 396 U.S. at 538 n. 10. Indeed, civil penalty actions resulting in monetary in personam judgments constitute "suits, which the common law recognized among its old and settled proceedings . . . ." *Parsons v. Bedford,* 28 U.S. [3 Pet.] 433, 447 (1830). Therefore, such suits are within the core of the Seventh Amendment's umbrella, just as traditional contract suits for damages or personal injury suits for negligence between private parties *inter sese* are within the core of the Seventh Amendment. In these circumstances, we submit that "the clear command of the Seventh Amendment" is in any event controlling.

Second, a fundamental factor in any analysis of policy factors must be the consistent recognition which this Court has given down through the years to the

important position of the Seventh Amendment in the American system of jurisprudence. *See Parsons v. Bedford, supra,* 28 U.S. [3 Pet.] at 446 ("The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy . . . ."); *Dimick v. Schiedt,* 293 U.S. 474, 485 (1935)[34]; *Jacob v. New York City,* 315 U.S. 752-53 (1942) ("The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealousy guarded by the courts.")

These cases are expressive of a constitutional priority of values which has guided this Court's dispositions in a wide variety of different civil jury trial contexts. Thus, for example, in *Byrd v. Blue Ridge Cooperative,* 356 U.S. 525 (1958), despite the acknowledged impinge-

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[34]In *Dimick,* this Court observed (293 U.S. at 485):

> "The right of trial by jury is of ancient origin, characterized by Blackstone as 'the glory of the English law' and 'the most transcendent privilege which any subject can enjoy' (BK 3 p. 379); and, as Justice Story said (2 Story on the Constitution, §1779), '. . . the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." With, perhaps, some exceptions trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history in jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' "

ment on the fundamental constitutional policies reflected in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), this Court recognized a right to jury trials in diversity suits in federal district courts involving state-created rights because of "affirmative countervailing considerations" (356 U.S. at 537) including "the influence of the Seventh Amendment" (*id.* at 539). And in cases such as *Beacon Theatres v. Westover*, 359 U.S. 500 (1959); *Dairy Queen v. Wood*, 369 U.S. 469 (1962); and *Ross v. Bernhard*, *supra*, where available analogies based on equitable remedies and equitable jurisdictional principles arguably could have doctrinally justified rejection of the jury right, the Court nonetheless insisted on the primacy of the values protected by the Seventh Amendment. And, even where the Court has permitted an encroachment upon the jury right, care has been taken to distinguish between the "substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure." *Colgrove v. Battin*, *supra*, 413 U.S. at 156.

Thus, even assuming *arguendo* that policy considerations may be taken into account in these cases, the government bears a heavy burden in seeking to justify on policy grounds curtailment of the right to a jury trial in these cases.[38]

In this regard, the judgment of the Third Circuit panel majority in the *Irey* case below would appear to be practically dispositive of any policy-based argument (Irey Cert. App. at 8b-9b n. 11 (emphasis added)):

[38]Cases such as *Dimick v. Schiedt*, *supra*; and *Jacob v. New York City*, *supra*, would appear to require a "strict scrutiny" standard of judicial review on any functional approach to a congressional claim of power to override Seventh Amendment policy interests. *See* note 26 *supra*.

"The dissent focuses on another disturbing element of this case – the denial of a jury trial under the Seventh Amendment. The majority, too, has serious misgivings as to the wisdom of limiting *de novo* review but does not agree with the dissent's conclusion of unconstitutionality. . . .

"However, we do share Judge Gibbons' reservations about the extremely limited scope of judicial review and the absence of opportunity to a *de novo* trial on the merits. While the prospect of burdening the courts with large numbers of appeals is a matter of concern from the standpoint of efficient judicial administration, we think experience demonstrates rather conclusively that in cases of this nature *de novo* review is seldom requested. It is the availability of the remedy, not its infrequent utilization, which is important to the cause of justice. The mere existence of a local fire department is a source of satisfaction to the citizen even though he would hope that he would never be forced to seek its assistance.

"*We perceive no overriding consideration which favors the congressional policy of recent years to insulate administrative adjudication from the open and searching examination that full judicial review provides. The necessity for an administrative agency on occasion to submit its determination to the scrutiny of a jury of citizens would be a healthful and disciplining experience.*"

B. The Policy Considerations on Balance Favor Recognition of the Jury Right.

In any event, policy considerations on balance actually affirmatively favor recognition of a right to a jury trial at some stage prior to final judgment of liability for an OSHA civil penalty.

1. It must be borne in mind that an OSHA penalty case – like all civil penalty cases – is a governmental proceeding. The Constitution of the United States provides in three places for jury rights: Article III, Section 3 (Criminal Cases); the Sixth Amendment (Criminal Cases); and the Seventh Amendment (Civil Cases). In *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) this Court explicated the constitutional policies underpinning the criminal jury right (emphasis added):

> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the Constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. If the defendant preferred the common-sense judgment of the jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. *Beyond this, the jury trial provisions in the Federal and State constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence . . . .*"

These same policy concerns against arbitrary governmental action are applicable to "civil" penalty proceedings brought by the government. Indeed, as we have argued in the initial section of this brief, they were part of the specific historical concerns of those who wrote the Seventh Amendment into the Constitution. *See* pp. 20-32, *supra*. And, while obviously this policy concern is greater in the context of a criminal proceeding, it is also true that in an administrative civil penalty proceeding the defendant lacks the added and perhaps equally fundamental constraint against biased or eccentric governmental action embodied in a life-tenured Article III federal judge.

Moreover, in an OSHA-type penalty adjudication, there is a specific convergence of the constitutional values underpinning criminal and civil jury rights not present to the same degree in other instances of administrative civil penalty adjudications. The panel majority in the *Irey* case, in response to Irey's contention that OSHA penalties were criminal penalties for purposes of application of the applicable constitutional safeguards in criminal cases, stated (Irey Cert. App. at 7b):

> "In the case *sub judice*, candor compels us to concede that the punitive aspects of the OSHA penalties, particularly for a 'willful' violation, are far more apparent than any 'remedial' features . . . ."

And the Fifth Circuit in the *Atlas* case expressly reserved the question whether a "willful" violation

could be the subject of a non-jury "civil enforcement" proceeding. Atlas Cert. App. at 14a n. 39. Even taking into account the "dialectical subtleties" involved in distinguishing criminal from civil penalties for constitutional purposes, *see United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (1943) (Frankfurter, J. concurring), it is apparent that the OSHA "civil" penalty at the very least comes close to the line.

In these cases, those portions of the petitions for certiorari addressed to the question whether the OSHA civil penalties are criminal penalties within the meaning of the Constitution were denied. *See* J. App. at 40a-41a. We therefore do not urge this question here. But in *United States v. United States District Court*, 407 U.S. 297, 313 (1972), this Court, as part of its analysis holding on Fourth Amendment grounds that warrants are required in domestic national security wiretapping cases, relied in direct part on the "convergence of First and Fourth Amendment values" present in national security cases and "not present in cases of 'ordinary' crime." *See* 407 U.S. at 313. A similar analysis is appropriate in the instance of the convergence of constitutional values underpinning the Sixth and Seventh Amendments in the specific context of an OSHA civil penalty adjudication.

2. Because of the nature of the employer's primary conduct giving rise to the government's charge of an OSHA violation "the practical abilities and limitations of juries" *Ross v. Bernhard, supra*, 396 U.S. at 538 n.

10, constitute a significant policy factor justifying recognition of the jury right in these cases.[36]

The issues involved in these cases are eminently suitable for jury disposition. Indeed, those issues fall within the traditional range of jury-fact questions in which the experience, views and attitudes of laymen are particularly valuable as a check against the tendencies to bureaucratic insularity and overreaching which can arise in any law enforcement enterprise when government officials believe themselves to be pursuing citizens who have engaged in such socially harmful conduct as maintaining a workplace which contains "recognized hazards that are causing or likely to cause death or serious physical harm to [their] employees" (Act, § 5,(a), 29 U.S.C. § 654(a)(1), Irey Cert. App. at 4e) (the "general duty" clause) or allowing a condition in a place of employment where "there is a substantial probability that death or serious physical harm could result . . . [when the employer knew or] with the exercise of

[36]We note that under this Court's decisions juries are called upon to decide the most complex and complicated issues of anti-trust, trademark, patent infringement and corporate law. *E.g., Dairy Queen v. Wood, supra; Beacon Theatres v. Westover, supra; Ross v. Bernhard, supra.* As the Court observed in *Dairy Queen, supra*, respecting this policy factor, 369 U.S. at 478:

> "In view of the powers given to the district courts by Federal Rule of Civil Procedure 53(b) to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for a jury adequately to handle alone, the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met."

Thus, this factor can rarely, if ever, operate as a factor justifying overriding the jury right.

reasonable diligence, [could have known] of the presence of the violation" (§ 17(k), 29 U.S.C. § 666(j), Irey Cert. App. at 18e) (the "serious" violation charged against Atlas) or "knowingly, consciously, and deliberately" creating a risk which actually kills one of his employees (the "willful" violation against Irey as interpreted by the Third Circuit below, *see* p. 82, *infra*).

And none of these issues involve any complexities taxing the practical abilities of juries. For example, in the *Irey* case, the principal charge was that "respondent willfully violated 29 C.F.R. 1926.652(b) by failing to shore, sheet, brace, slope or otherwise support by means of sufficient strength the sides of a trench located at the aforementioned work site." Secretary's Complaint in No. 75-748, ¶IV, J. App. at 15a. The OSHA regulation, 29 C.F.R. 1926.652(b) states (Irey Cert. App. at 2c):

> "Sides of trenches in unstable or soft material, five feet or more in depth, shall be shored, sheeted, braced, sloped or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2."
>
> "Table P-1: approximate angle of repose for sloping of sides of excavations: solid rock, shale or cemented sand and gravel – 90°. Compacted angular gravel – 1/2 to 1. Average soils – 1 to 1."

Chairman Moran's dissent from the Occupational Safety and Health Review Commission's opinion in the *Irey* case summarizes the evidence as follows:

> "The evidence reveals that on November 23, 1971, nearly two months prior to the cave-in, which is at issue in this case, respondent had employees engaged in digging a trench for the laying of an electrical conduit at the Evandale campus of West Virginia University. The trench wall had not been sloped or shored. Respondent's superintendent thought that the material in which they were digging was composed of shale, a material requiring no sloping or support under the Occupational Safety and Health standard quoted above. He reached this conclusion after reading the results of a soil analysis which had been undertaken at the direction of the prime contractor for this particular job. However, unbeknown to respondent, its superintendent misread the chart and the shale actually started 1/2 foot below the trench bottom. The trench walls were weathered shalely limestone of silty clay.
>
> "On the same day, an inspector from the State of West Virginia Labor Department visited respondent's work site and advised that due to rainy weather and snow conditions, the ground was thoroughly wet and dangerous and ordered that the trench walls be sloped. This was accomplished. Subsequently, however, weather conditions improved and respondent returned to the digging of vertical trenches.
>
> "On January 11, 1972, respondent was still engaged in trenching operations at the University site. There had been a rainfill the previous night, and the collected rainwater had been pumped from the trench in the morning. A cave-in occurred that day while one of respondent's employees was in the trench, causing his death. This citation for willful violation followed."

See Irey Cert. App. at 2c-3c.

Irey, as noted, was cited for a "willful" violation under Section 17a of the Act and received a $7,500 proposed penalty, (subsequently reduced to $5,000). The hearing officer found a willful violation under the

Act and the Commission affirmed over Chairman Moran's dissent. On review of the facts the Court of Appeals for the Third Circuit ruled that the Commission had applied the wrong legal standard for a "willful" violation (Irey Cert. App. at 11b-12b):

> "The Act defines a 'serious' violation as one which requires proof of a substantial probability that condition, 'unless the employer did not, and could not with the exercise of reasonable diligence know of the presence of the violation.' To rephrase, a finding of a 'serious' violation requires that the condition was hazardous and that the employer knew or should have known of it – precisely the alternative definition of 'willful' which the hearing officer adopted.
>
> "It is obvious from the size of the penalty which can be imposed for a 'willful' infraction – ten times that of a 'serious' one – that Congress meant to deal with a more flagrant type of conduct than that of a 'serious' violation. Willfulness connotes defiance or such reckless disregard of the consequences as to be equivalent to a knowing, conscious and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission – it involves an element of obstinate refusal to comply."

The essential factual question raised for jury determination in such a case – *i.e.*, whether Irey recklessly created a homicidal risk with respect to one of its employees – is not only well within the range of the practical limitations and abilities of juries, but the sort of question on which any citizen in our society has a right to invoke the judgment of his peers before he is stigmatized with a finding of liability. More generally,

there is not a single factual question or legal standard which can seriously be described as too "complex" for jury understanding in the entire range of violations raised in both the *Irey* and *Atlas* cases. *See*, J. App. at 14a-16a (Complaint in *Irey* case); *id.*, 31a-33a (Complaint in *Atlas* case).

3. No legitimate argument can be made in this case that recognition of a defendant's right to a jury trial will in any way result in crowding the dockets of the district courts or overburdening the administration of justice. Throughout our nation's history the consistent and – until recent years – almost unbroken practice with respect to civil monetary penalty adjudications has been to recognize a right to a trial by jury at some stage prior to final judgment of liability for the penalty. Thus, Appendix A to Professor Goldschmid's report includes a compilation of the results of a survey of the use of civil money penalties by federal administrative agencies conducted in 1971. This compilation shows that of the 34 agencies listed, 30 permitted *de novo* judicial review. 2 Recommendations and Report of the Administrative Conference of the United States, 948-52, (July 1, 1970 - December 31, 1972). [Hereinafter cited as "Goldschmid".] The overwhelming experience is that the civil penalty cases are settled without ever getting

to district court.[37] Therefore, there is simply no basis for a priori speculations that recognizing a *de novo* jury trial right in the context of the OSHA scheme is going to result in overburdening the federal courts. In fact, Professor Goldschmid's own report specifically rejects that possibility (Goldschmid at 931) (footnote omitted):

> "All evidence points to settlements or uncontested assessments taking place under an administrative imposition system at about the same rate as they take place at an agency level now. Under the Occupational Safety and Health Act of 1970, for example, 7,450 citations were issued, and $512,067 assessed, during the first five months of the 1972 fiscal year; fewer than 5% of these citations were contested by a request for a hearing before the OHSRC. . . ."

Indeed, upon proper analysis the judicial economy consideration is actually a strong a fortiori argument for recognition of the jury right in the context of civil penalty proceedings. Thus, if the federal courts are overburdened, it is because of categories of litigation

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[37]Professor Goldschmid reports, *id.* at 921 n. 41:

> "Of the 80,435 civil cases terminated in federal district courts in the 1970 fiscal year, only 9,449 were terminated after trial (see Director of the Administrative Office of the United States Courts, 1970 Annual Report 107, 127 (1971)). Settlements undoubtedly accounted for a substantial part of the remainder. Of course, of the 15,608 money penalty cases processed by federal agencies in fiscal 1971, well over 90% were settled. If settlements did not occur, there would probably be no way of absorbing the additional cases in a system 'already being engulfed by a tidal wave of litigation' . . . [citations omitted]."

such as diversity suits between private parties *inter sese* (where this court has recognized a jury trial right even if under applicable state law there would be no right, *see Byrd v. Blue Ridge Cooperative, supra*); and other categories of traditional private litigation carrying jury rights. Moreover, out of regard for the right to trial by jury as a "basic and fundamental feature of our system of federal jurisprudence", *Dice v. Akron, C. & Y. Ry.*, 342 U.S. 359, 363 (1952) *quoting from Bailey v. Central Vermont R. R.*, 319 U.S. 350, 354 (1952), this Court has, albeit as a matter of statutory construction, interpreted the Federal Employer's Liability Act to impose on state courts an obligation to grant jury trial rights for determination of disputed factual issues even where under the applicable state law there would be no right to trial by jury. Thus, even assuming *arguendo* considerations based on allocation of federal judicial decision-making resources are a legitimate policy consideration, the civil penalty cases would be the last place a plausible argument could be made for encroaching upon the category of cases encompassed by the Seventh Amendment.[38]

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[38]In concurring in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411 (1971) Mr. Justice Harlan observed:

> "Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of recognition of otherwise sound constitutional principles."

4. Nor is there any likelihood of substantial interference with the agency's law enforcement goal, even assuming *arguendo* that this is a legitimate policy interest that the government might advance as justifying defeating a claim of constitutional right on the part of the defendant to a procedural protection in a law enforcement proceeding brought by the government against him. Thus, for Seventh Amendment purposes, the right to a jury trial need only come at some stage prior to final judgment. The administrative process then could still go forward exactly as it presently does, with no need to call in a jury to participate in the case with the administrative law judge. In the overwhelming number of cases, the penalty adjudication proceeding will never get beyond the administrative process; only in those numbers of cases where the size of the penalty or the nature of the charge is of sufficient seriousness to justify a private employer's investing in the substantial costs of further litigation would there be any prospect of seeking *de novo* judicial review. Moreover, it must be borne in mind that the *de novo* review would occur after a testimonial and evidentiary record has already been made in the administrative process.[39] Necessarily, then, the prospect of "frivolous" cases or "delaying" tactics being utilized in district court are minimal. The only way the case could go forward is if there is a significant and serious factual dispute (that has not already been clarified through the process of administrative adjudication) which would

[39]The variety of devices available generally to avoid waste and duplication in *de novo* review proceedings are evaluated in *Hackley v. Roudebush*, 520 F.2d 108, 149-59 (D.C. Cir. 1975). *See also* Pernell v. Southall Realty, *supra*, 416 U.S. at 384.

justify a United States District Judge in permitting the case to go beyond the summary judgment stage. And, of course, it is in just such a category of cases – *i.e.*, where the defendant is not satisfied with the justice he received at the hands of the Executive branch of the government and can still raise a serious factual question in the face of a sworn evidentiary record, and is willing to invest in the substantial litigating costs involved in pursuing a lawsuit against the government of the United States – that he should have a right to do so and to invoke the intervening judgment of his peers.

CONCLUSION

We close with two quotations, one from the author of the Bill of Rights and one from the author of the Declaration of Independence.

James Madison once counselled, in reference to the necessity of a separation of the departments of government,

> "Temporary deviations from fundamental principles are always more or less dangerous. When the first pretext fails, those who become interested in prolonging the evil will rarely be at a loss for other pretexts. The first precedent, too, familiarises the people to the irregularity, lessens their veneration for those fundamental principles, and makes them a more easy prey to ambition and self interest. Hence it is that abuses of every kind, when once established, have been so often found to perpetuate themselves." Letter from James Madison to John Brown, dated August 23, 1785, 2 *Works of Madison* 183 (1900).

On February 2, 1788 Thomas Jefferson wrote William Stephens Smith concerning the deletion of the civil jury right from the original draft of the Constitution (Thomas Jefferson Papers, Princeton University Press, 1950, Vol. 12 at 558):

> "I am glad to learn by letters which come down to the 20th. of December that the new constitution will undoubtedly be received by a sufficiency of the states to set it a going. Were I in America, I would advocate it warmly till nine should have adopted, and then as warmly take the other side to convince the remaining four that they ought not to come into it till the declaration of rights is annexed to it. By this means we should secure all the good of it, and procure so respectable an opposition as would induce the accepting states to offer a bill of rights. This would be the happiest turn the thing could take. I fear much the effects of the perpetual re-eligibility of the President. But it is not thought of in America, and have therefore no prospect of a change of that article. But I own it astonishes me to find such a change wrought in the opinions of our countrymen since I left them, as that threefourths of them should be contented to live under a system which leaves to their governors the power of taking from them the trial by jury in civil cases, freedom of religion, freedom of the press, freedom of commerce, the habeas corpus laws, and of yoking them with a standing army. This is a degeneracy in the principles of liberty to which I had given four centuries instead of four years. But I hope it will all come about. We are now vibrating between too much and too little government, and the pendulum will rest finally in the middle. Adieu, yours affectionately,
>
> TH: JEFFERSON

For the foregoing reasons, the judgments of the Courts of Appeals should be reversed.

Respectfully submitted,

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Nos. 75-748 and 75-746

In the Supreme Court of the United States

OCTOBER TERM, 1976

FRANK IREY, JR., INC., PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ATLAS ROOFING COMPANY, INC., PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75–748

FRANK IREY, JR., INC., PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

No. 75–746

ATLAS ROOFING COMPANY, INC., PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

In No. 75–748, the opinion of the court of appeals *en banc* (Irey Cert. App. 1a–23a)[1] is reported at 519

[1] "Cert. App." references are to the appendices incorporated in the respective petitions for a writ of certiorari in these cases. "J.A." references are to the Joint Appendix filed in this Court.

F. 2d 1215. The panel opinion of the court of appeals (Irey Cert. App. 1b–26b) is reported at 519 F. 2d 1200. The opinion and order of the Occupational Safety and Health Review Commission (Irey Cert. App. 1c–8c) are reported at 4 OSAHRC 1. The opinion and order of the Review Commission's administrative law judge (Irey Cert. App. 1d–21d) are reported at 4 OSAHRC 8.

In No. 75–746, the opinion of the court of appeals (Atlas Cert. App. 1a–27a) is reported at 518 F. 2d 990. The opinion and order of the administrative law judge (Atlas Cert. App. 1b–13b), which became the Review Commission's opinion and order by operation of law, are reported at 3 OSAHRC 19.

JURISDICTION

In No. 75–748 the judgment of the court of appeals was entered July 24, 1975 (Irey Cert. App. 24a–25a). On October 14, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to November 21, 1975, and the petition was filed on that day. On March 22, 1976, the petition was granted, but limited to the Seventh Amendment issue (see J.A. 40a–41a).

In No. 75–746 the judgment of the court of appeals was entered September 8, 1975 (Atlas Cert. App. 28a–29a). The petition for a writ of certiorari was filed on November 21, 1975, and was granted to the same limited extent on March 22, 1976.

These cases were consolidated by the order granting certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the statutory procedures by which the Occupational Safety and Health Review Commission assesses limited civil penalties, as part of its duty under the Occupational Safety and Health Act of 1970 to resolve contested cases and direct abatement of working conditions found hazardous, deny respondent employers any right to the civil jury trial guaranteed by the Seventh Amendment "in suits at common law."

STATUTES INVOLVED

The Occupational Safety and Health Act of 1970 is reprinted at Irey Cert. App. 1e–31e. The Seventh Amendment provides that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT

1. THE STATUTORY SCHEME

The Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. 651 *et seq.* (OSHA), was passed to alleviate the "drastic" national problem of work-related deaths and injuries with a view to assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651; *National Realty and Construction Co.*

v. *Review Commission*, 489 F. 2d 1257, 1260–1261 (C.A.D.C.).[2] The Act neither alters nor addresses

[2] See, *e.g.*, *Southern Railway Co.* v. *Review Commission*, slip op. pp. 10–11 (C.A. 4, No. 75–1055), decided Feb. 9, 1976, rehearing denied June 23, 1976, petition for a writ of certiorari filed July 23, 1976; *Lee Way Motor Freight, Inc.* v. *Secretary of Labor*, 511 F. 2d 864, 870 (C.A. 10); *Ryder Truck Lines, Inc.* v. *Brennan*, 497 F. 2d 230, 233 (C.A. 5); *Brennan* v. *Review Commission and Gerosa, Inc.*, 491 F. 2d 1340 (C.A. 2); *Brennan* v. *Review Commission and Interstate Glass Co.*, 487 F. 2d 438, 439 (C.A. 8).

The Senate Report stated that: "The problem of assuring safe and healthful workplaces for our working men and women ranks in importance with any that engages the national attention today. * * * 14,500 persons are killed annually as a result of industrial accidents; accordingly, during the past four years more Americans have been killed where they work than in the Vietnam war. By the lowest count, 2.2 million persons are disabled on the job each year, resulting in the loss of 250 million man days of work—many times more than are lost through strikes. In addition to the individual human tragedies involved, the economic impact of industrial deaths and disability is staggering. Over $1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is estimated to be over $8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses. This "grim current scene" * * * represents a worsening trend, for the fact is that the number of disabling injuries per million man hours worked is today 20% higher than in 1958." S. Rept. No. 91–1282, 91st Cong., 2d Sess. 2 (1970); Leg. Hist. 142. See also H.R. Rept. No. 91–1291, 91st Cong., 2d Sess. 14–15 (1970); Leg. Hist. 844–845 ("The issue of the health and safety of the American working man and woman is the most crucial one in the whole environmental question * * * the worst problem confronting American workers").

House and Senate debates are reprinted, along with the House, Senate and Conference reports, in a one-volume Committee Print entitled Legislative History, Occupational Safety and Health Act of 1970, Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. (June 1971) (cited herein as "Leg. Hist.").

traditional private obligations between employers and employees relating to injuries actually caused by unsafe or unhealthy conditions. *Ibid.*, 489 F. 2d at 1260, n. 6; Section 4(b)(4), 29 U.S.C. 653(b)(4). Instead, it creates a new statutory duty to avoid maintaining such conditions, 29 U.S.C. 654(a) (1) and (2), applicable to all nongovernmental employers whose business affects commerce. The law is enforced by the Secretary of Labor through a self-contained administrative mechanism whose central features are speedy, expert and uniform resolution of contested cases by the independent Review Commission, subject to the usual appellate review. 29 U.S.C. 651 (2), (3) and (10), 652(5), 657(a), 658–661. See, generally, *National Realty and Construction Co.* v. *Review Commission, supra*, 489 F. 2d at 1261–1264; *Brennan* v. *Winters Battery Mfg. Co.*, 531 F. 2d 317 (C.A. 6), certiorari denied, No. 75–1162 (May 24, 1976); *Brennan* v. *Review Commission and Gordon Co.*, 492 F. 2d 1027, 1030 (C.A. 2).

Under the Act's expedited enforcement procedures, the Secretary's inspectors are authorized to conduct safety and health inspections at reasonable times and in a reasonable manner at places of employment. 29 U.S.C. 657(a). If, upon inspection or investigation, the Secretary has cause to believe that the Act or its implementing regulations have been violated, he is empowered to issue a citation to the employer specifically describing the violation, proposing a reasonable time for its abatement, and (in his discretion) proposing a civil monetary penalty. 29 U.S.C. 658, 659.

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The amount of the proposed penalty "if any" (29 U.S.C. 659(a)) depends on the severity of the hazard and the cited employer's past diligence in attempting to discover and correct it (*ibid.*, see 29 U.S.C. 666 (i) and (j)), and is designed to promote voluntary compliance by employers before any inspector arrives. 29 U.S.C. 651(1); see Leg. Hist. 463–464, 470 (Sen. Javits), 471–472 (Sen. Dominick), 853; *Brennan* v. *Review Commission and Interstate Glass Co., supra,* 487 F. 2d at 441, 443. Cf. *National Independent Coal Operators' Assoc.* v. *Kleppe,* 423 U.S. 389, 401. Such proposed penalties may range from nothing for *de minimis* and nonserious violations, to not more than $1,000 for serious violations, to a maximum of $10,000 for willful or repeated violations. 29 U.S.C. 658(a), 659(a), 666 (a)–(c) and (j). The Secretary may also propose a civil penalty of not more than $1,000 per day of nonabatement where subsequent inspection reveals noncompliance with a final Commission order, 29 U.S.C. 659(b), 666(d), and may seek temporary injunctions in federal district court to correct imminent dangers before administrative enforcement would result in their abatement. 29 U.S.C. 662. Finally, in cases of willful violations that cause employee death, the Secretary is authorized to refer the matter to the Justice Department for criminal prosecution, which may result in a maximum sentence of six months' imprisonment and a $10,000 fine, but unlike civil administrative enforcement entails no explicit abatement requirement. 29 U.S.C. 666(e).

If an employer wishes to contest the citation or the

proposed abatement period or penalty, he must notify the Secretary within 15 working days, otherwise the citation, the abatement period and assessment as proposed become final. 29 U.S.C. 659(a). If the employer contests, the Secretary's proposed abatement order is automatically stayed and no final order directing correction of the violations is entered until proceedings before the Commission are concluded. 29 U.S.C. 659 (b), 666(d). Upon the filing of an employer contest, an evidentiary hearing is held before an administrative law judge of the Occupational Safety and Health Review Commission, an agency independent of the Secretary created to "carry out adjudicatory functions under the Act" and composed of three members with six-year terms, qualified to review contested citations and assess penalties "by reason of training, education or experience." 29 U.S.C. 651(3), 659(c), 661, 666(i); see Irey Cert. App. 4b, n. 3. At this hearing the burden is on the Secretary to establish the elements of the alleged violation and the propriety of his proposed abatement period and proposed penalty, and the judge is empowered to affirm, modify, or vacate any or all of these items, giving due consideration in his penalty assessment to "the size of the business of the employer * * *, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. 666(i). The judge's decision becomes the Commission's final order unless within thirty days a Commissioner directs that it be reviewed.

29 U.S.C. 659(c), 661(i); see 29 CFR 2200.90 and 2200.91.[3]

If review is granted, the Commission's subsequent order directing abatement and the payment of any assessed penalty becomes final unless the employer timely petitions for judicial review in the appropriate court of appeals. 29 U.S.C. 660(a). The Secretary similarly may seek review of Commission orders, 29 U.S.C. 660(b), but, in either case, "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." 29 U.S.C. 660(a). If the cited employer fails timely to contest a citation or to petition for court of appeals review, the Secretary is empowered to ensure abatement by seek-

[3] Contrary to petitioners' suggestion (Br., n. 4), neither the Act nor the Review Commission assumes that employer contests are "solely for delay" or that an express Commission finding of good faith is required to protect contesting employers from retroactive nonabatement penalty assessments. The Act presumes good-faith contests, and to our knowledge neither the Secretary nor the Commission has ever attempted to impose such a retroactive penalty. Any such attempt would have to be commenced by a separate citation, contestable before the Commission and subject to the same review as any other citation and proposed penalty assessment. See 29 U.S.C. 659(b), 666(d); *Lake Butler Apparel Co.* v. *Secretary of Labor*, 519 F. 2d 84, 86–87 (C.A. 5).

The Commission's statutory power to increase proposed penalties to accord with the evidence fully adduced at hearing (Pet. Br., n. 5) has been repeatedly affirmed by lower courts and is not before the Court. 29 U.S.C. 659(c), 666(i); see *Dan J. Sheehan Co.* v. *Review Commission*, 520 F. 2d 1036, 1042 (C.A. 5), certiorari denied, No. 75–747 (March 22, 1976); *California Stevedore and Ballast Co.* v. *Review Commission*, 517 F. 2d 986 (C.A. 9).

ing a summary judicial decree, enforceable by contempt, in the court of appeals. 29 U.S.C. 660(b); see Irey Cert. App. 3a. If the cited employer abates but fails to pay the penalty finally assessed by a Commission order, the Act provides for a civil collection action in federal district court, in which neither the fact of violation nor the propriety of the penalty assessed may be retried. 29 U.S.C. 666(k); see Leg. Hist. 1220; Irey Cert. App. 2a–4a.

2. THE FACTS

Petitioners were separately cited by the Secretary and ordered immediately to abate pertinent hazards after inspections of their respective worksites conducted in 1972 revealed that each had violated a mandatory occupational safety standard and in each case an employee's death had resulted (Irey Cert. App. 10d–12d; Atlas Cert. App. 6b–10b).[4] Petitioners timely contested these citations and were afforded

[4] 29 U.S.C. 654(a)(2) requires all employers affecting interstate commerce to "comply with occupational safety and health standards promulgated under this chapter." Petitioner Irey was cited for a civil willful violation of 29 CFR 1926.652(b) and Table P–1, which require the sides of trenches in "unstable or soft material" to be "shored, * * * sloped, or otherwise supported by means of sufficient strength to protect the employees working within them." The Secretary proposed a penalty of $7,500 for this violation and ordered it abated immediately (J.A. 6a–7a, 10a–17a). Petitioner Atlas was cited for a serious violation of 29 CFR 1926.500(b)(1) and (f)(5)(ii), which require that roof opening covers be "so installed as to prevent accidental displacement." See also 29 CFR 1926.502(b). The Secretary proposed a penalty of $600 for this violation and ordered it abated immediately (J.A. 26a–30a).

hearings before Review Commission administrative law judges. The judges and Commission affirmed the violations and accompanying abatement requirements and assessed petitioner Irey a reduced civil penalty of $5,000 and petitioner Atlas the civil penalty of $600 which the Secretary had proposed.[5] Petitioners thereupon sought judicial review in the courts of appeals for the Third and Fifth Circuits, challenging both the Review Commission's violation-findings and the constitutionality of the Act's enforcement procedures.

3. THE COURTS OF APPEALS' DECISIONS

a. On review of the Commission's *Irey* decision a panel of the court of appeals for the Third Circuit affirmed, with one dissent, the constitutionality of the Act's enforcement scheme.[6] While the employer had

[5] The Review Commission summarily affirmed the judge's decision in *Irey* (Irey Cert. App. 1c). It did not grant discretionary review to petitioner Atlas and the judge's order (Atlas Cert. App. 13b) became the Commission's by operation of law. See 29 U.S.C. 661(i).

[6] The panel unanimously dismissed the contention that the civil penalties authorized by the Act were actually criminal fines necessitating a jury trial under Article III of the Constitution and the Sixth Amendment, holding that congressional intent to create a civil sanction was clear and "we have now come too far down the road to hold that a civil penalty may not be assessed to enforce observance of legislative policy" (Irey Cert. App. 7b–9b, 14b). See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144. The panel also upheld the Act's requirement that an employer contest a citation to prevent its becoming final, finding no deprivation of due process where an employer is given "adequate opportunity for a hearing at a time when deprivation can still be averted" (Irey Cert. App. 9b–10b). See *National Independent Coal Operators' Assoc.* v. *Kleppe*, *supra*. Finally, the panel affirmed the existence of the substantive safety violation charged by the Secretary and found by

not expressly claimed a Seventh Amendment right to jury trial, Judge Gibbons in dissent concluded that the Seventh Amendment applied to Review Commission penalty assessments and required that an opportunity for trial *de novo* before a jury be afforded penalized employers. He would accordingly have found that the Act's failure to provide for a jury trial at any stage rendered its civil penalty provisions constitutionally infirm (Irey Cert. App. 13b–26b). This conclusion was premised on Judge Gibbons' characterization of the proceeding before him as one in which "the only relief sought was the recovery of an *in personam* money judgment" (Irey Cert. App. 24b) and was drawn from an historical analysis purporting to show that only equitable, *in rem,* or admiralty civil penalty proceedings fell outside the traditional realm of "suits at common law" necessitating a Seventh Amendment jury trial. The panel majority *inter alia* rejected it because "the differences between *in rem* and *in personam* actions are [not] sufficient to distinguish the thrust of * * * [this Court's]" precedents upholding administrative imposition of civil penalties after due process notice and hearing as prescribed here (Irey Cert. App. 8b, n. 11).

On rehearing *en banc* directed to this previously unbriefed Seventh Amendment issue (Irey Cert. App. 2a–9a), the court concluded (four judges dissenting)

the Commission, but reversed the administrative finding that Irey acted "willfully" and remanded the case to the Commission for further proceedings to determine whether that violation was willful or "serious" (*compare* 29 U.S.C. 666(a) *with* 666 (b) and (j)) under the proper "legal standard" (Irey Cert. App. 11b–13b).

that enforcement actions under the Act are "administrative adjudications," that this "Court's rulings to date leave no doubt that the Seventh Amendment is not applicable, at least in the context of a case such as this one, and that Congress is free to provide an administrative enforcement scheme without the intervention of a jury at any stage" (Irey Cert. App. 8a). The majority relied, *inter alia,* on *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48–49; *Curtis* v. *Loether*, 415 U.S. 189, 194; and *Pernell* v. *Southall Realty,* 416 U.S. 363, 383. Judge Gibbons for the dissenters suggested the majority was abdicating its role as "final arbiter" of the Constitution by failing to "define the limits" of administrative adjudications (Irey Cert. App. 13a, 14a), adhering to his belief that under *Jones & Laughlin* Congress could only transfer traditionally jury-free equitable proceedings to an administrative agency and that the instant enforcement proceeding was an action for debt which would have required a jury trial at common law. The majority responded that it was not deferring to Congress but this Court, which had recently reaffirmed its holding in *Jones & Laughlin* that the Seventh Amendment is generally inapplicable to administrative adjudications. Since the majority found the discretionary agency back pay awards in *Jones & Laughlin* constitutionally indistinguishable from discretionary civil penalties in their impact on the employer (Irey Cert. App. 8a–9a), it held the Act safely within present Seventh Amendment limits on Congressional action, and refrained from attempting broadly to determine those limits for all time.

b. On review of the Commission's *Atlas* order the court of appeals for the Fifth Circuit unanimously rejected the employer's identical claim to a Seventh Amendment jury trial, holding (Atlas Cert. App. 25a):

> Where adjudicative responsibility rests only in the administering agency, "jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the [agency's] role in the statutory scheme." *Curtis* v. *Loether* * * *.

The court also found unpersuasive the distinction between *in rem* and *in personam* actions urged by Judge Gibbons, indicating that to adopt it "would produce the absurd spectacle of Congress—having full power to prescribe an administrative structure with sanctions of denial or revocation of a life-or-death license * * *—being denied the power to prescribe [a similar mechanism to impose] a money fine * * *" (Atlas Cert. App. 25a–26a).[7]

[7] The court also declined to hold the Act's civil penalties criminal in nature, unanimously concluding that those penalties are remedial rather than punitive and serve as a "reasonable adjunct" to the Act's primary purpose of securing the speedy abatement of dangers threatening employees (Atlas Cert. App. 12a–25a). It additionally held that the employer's opportunity to be heard before any detriment is suffered obviated due process objections to the Act's contest procedure, and affirmed the agency's fact-findings in all other respects (Atlas Cert. App. 26a–27a).

Shortly thereafter the court addressed the Seventh Amendment contention again, noting: "It has long been recognized that it is well within the powers of Congress to entrust the enforcement of statutory rights to an administrative process and limit the par-

The other courts of appeals which have passed on this issue have uniformly (and without a dissent) agreed with these results. *Beall Construction Co.* v. *Review Commission,* 507 F. 2d 1041 (C.A. 8); *Brennan* v. *Winters Battery Mfg. Co., supra; Clarkson Construction Co.* v. *Review Commission,* 531 F. 2d 451 (C.A. 10). See also *Underhill Construction Corp.* v. *Secretary of Labor,* 526 F. 2d 53, 57, n. 10 (C.A. 2).[8]

ARGUMENT

INTRODUCTION AND SUMMARY

The claim in this case is that the Seventh Amendment affords an alleged violator a right to trial by jury when the government seeks to assess against him any of the civil monetary penalties provided by the Occupational Safety and Health Act of 1970. It is not suggested that the statute itself interposes a civil jury; on the contrary, it is conceded that Congress, by confiding the factual determination to an administrative tribunal and prescribing limited judicial

ticipation of the Courts by the substantial evidence standard. * * * The administrative proceedings under OSHA present no unusual features that would cause us to deviate from this rule." *Lake Butler Apparel Co.* v. *Secretary of Labor, supra,* 519 F. 2d at 88–89 (citations omitted).

[8] The Seventh Amendment issue has also been raised in the Fourth and Second Circuits. *Dorey Electric Co.* v. *Review Commission et al.*, C.A. 4, No. 74–2181 (pending decision); *Floyd S. Pike, Electrical Contractor, Inc.* v. *Review Commission et al.*, C.A. 4, No. 75–1314 (pending decision); *Mohawk Excavating Inc.* v. *Review Commission et al.*, C.A. 2, No. 76–4068 (pending argument). The Fourth Circuit has indicated it will await this Court's decision before deciding the two cases before it (orders of April 5, 1976).

review, has deliberately withheld any right to jury trial. Accordingly, petitioners must rely exclusively on an alleged constitutional imperative. This brings us at once to the Seventh Amendment.

The Amendment "preserve[s]" the right of trial by jury "in suits at common law" involving more than twenty dollars. The critical question, of course, is whether the proceeding to enforce the Occupational Safety and Health Act is a "suit at common law." We submit it is not. The reason, one is tempted to say, is simply that the *administrative* character of the proceeding removes it from the category of "suits at common law" which alone are subject to the Seventh Amendment's jury trial guarantee. Indeed, this short answer is strongly supported by *dicta* in the most recent decisions of the Court, where it is suggested that Congress may avoid "the strictures" of the Amendment with respect to disputes otherwise embraced by the Amendment merely by assigning the fact-finding function to an administrative agency "where jury trials would be incompatible with the whole concept of administrative adjudication." *Pernell* v. *Southall Realty,* 416 U.S. 363, 383; *Curtis* v. *Loether,* 415 U.S. 189, 194–195. But, as petitioners point out, there remains the question what kind of disputes constitutionally can be removed from the courts to agencies. We assume some limits are imposed by the Seventh Amendment,[9] and we believe it our duty to attempt to define the line, at least insofar as it affects the present case.

[9] So saying, we do not in the least enter the debate whether Congress might abolish the inferior federal courts or withdraw

There are several possible approaches to the question. Fortunately, because of the restricted argument advanced by petitioners and the limited grant of certiorari, we need not explore them all in this brief. It is unnecessary here to consider constitutional limitations, if any, not rooted in the Seventh Amendment, which may affect the propriety of administrative resolution of private disputes traditionally adjudicated by admiralty courts or courts of equity. See *Crowell* v. *Benson,* 285 U.S. 22, 48–54. We are concerned only with an alleged Seventh Amendment bar and, in the context of this case, it is enough if we overcome that obstacle. For it is not suggested in this Court that, the Seventh Amendment aside,[10] there is any constitutional question about the sufficiency of the administrative process provided for implementing the Occupational Safety and Health Act. Accordingly, the petitioners must first establish that neither the character of the parties nor the nature of the dispute involving governmental enforcement of a regulatory program excludes it from the umbrella of the Seventh Amendment. Should they succeed, they must still show

much of their present jurisdiction *without establishing alternative federal forums.* To the extent that can be done and judicial business is thereby transferred to State courts, the result, it is true, would be to avoid the strictures of the Seventh Amendment, which is inapplicable to the States (see p. ~~70~~ 80, *infra*).

But it is a wholly different question how far Congress, while continuing to exercise *federal* power to decide disputes, may, by changing the federal forum, exempt adjudication from the right of trial by jury.

[10] Because of the limited grant of certiorari, we are excused from discussing the claim advanced under the Sixth Amendment.

that the congressional *choice of forum* does not permissibly avoid the bite of the Amendment. And, even then, they must establish that this specialized and generally equitable cease-and-desist scheme is subject to the Amendment. But if, as we primarily submit, the character of the parties itself puts the matter beyond the reach of the Amendment, that is an end of the challenge.

Our approach, then, is to look first at the Seventh Amendment to determine whether it encompasses our case. There is a persuasive argument (which we explore as an alternative ground) that the case sounds in equity rather than law and for that reason escapes the Amendment. But we believe there is a more fundamental ground. It is this: that the Seventh Amendment is concerned only with *private* litigation and has no application whatever to the resolution of disputes between the citizen and his government.

The focus of the Seventh Amendment on private disputes is plainly revealed in the history surrounding its adoption. In our submission, that is dispositive. To be sure, the exact boundaries of the category that encompasses "suits at common law" is not frozen as of 1791, now including many actions created by statute. See *Curtis* v. *Loether, supra,* 415 U.S. at 193–194. But it is surely beyond debate that a distinction so fundamental as that between public and private litigation, if made by those who framed the Amendment, must be observed today.

1. As indicated, our first and primary argument (pp. 19–61, *infra*) is that the Seventh Amendment was

never intended to control government litigation of *any kind*, in *any forum*. We reach this conclusion after examining the post-Revolution State Constitutions (most of which contain provisions guaranteeing jury trial in civil cases), the debates on the subject in the State conventions which ratified the federal Constitution, together with the civil jury trial amendments many of those conventions recommended, and, finally, the debates in the First Congress which framed the Bill of Rights, and especially the first draft of the Seventh Amendment as proposed by Madison. What emerges, with perhaps surprising clarity, is that the concern that provoked the adoption of the Amendment, revealed in the various model texts, was confined to *private* litigation. In our submission, this historical evidence is conclusive. Nevertheless, in deference to contrary assumptions apparently indulged by most authorities over the last two centuries—perhaps including this Court—we proceed to explore narrower grounds of decision.

2. In a second argument (pp. 61–~~81~~ 82, *infra*), we suggest that, even if the Seventh Amendment applies to government suits to collect civil penalties when a judicial forum is chosen, Congress is free, in this area, to avoid the delays and potential inconsistencies inherent in jury trials by confiding the fact-finding process to an administrative agency. While the Court has indicated that the same Congressional discretion is available with respect to at least some private disputes, we confine our submission to governmental enforcement of monetary penalties in the implementation of a regulatory program. This very narrow proposition is, we show, wholly consistent with the jurisprudence of the Court since its beginning.

3. Finally (pp. ~~81–88~~ 83–89, *infra*), invoking *Katchen* v. *Landy*, 382 U.S. 323, we suggest that the agency created to adjudicate these cases is like a specialized statutory court of equity which can exercise summary jurisdiction over otherwise jury-triable issues if the interposition of a jury would dismember the statutory scheme. That analogy is justified, we say, because the Review Commission's primary task is to grant or deny permanent injunctive relief respecting alleged safety and health violations endangering workers, to which the discretionary power to impose limited civil monetary penalties is integral.

I. THE SEVENTH AMENDMENT DOES NOT CONTROL THESE CASES BECAUSE THE GOVERNMENT IS A PARTY

The language of the Seventh Amendment is ambiguous. What are "suits at common law"? It is no use pondering those words in the abstract. Nor does it help to turn to England whence the expression comes. For, there, "common law" has been used to describe many different things. To Lord Coke, "common law" was a kind of constitutional law. For others, it distinguishes unwritten law from statute law, whether in the criminal or civil arena. Sometimes, the reference is simply to a category of forum, the "common law courts." Or, regardless of the forum, the words may connote a form of procedure. Our own primary submission is that, in the Seventh Amendment, "suits at common law" means private actions of a certain kind,

as contrasted with governmental litigation which involves "public law."

But whether we are right or wrong is not demonstrable by reference to dictionaries, to English cases or commentators, or even to the disparate practices in colonial America. For our part, we confine ourselves to a time nearer the framing of the Seventh Amendment and to those documents and debates that are known to be in the direct line of descent. That, in our view, is the only safe path to uncovering the original understanding of the Amendment.

A. THE HISTORICAL EVIDENCE

As is well-known, the Seventh Amendment was framed in response to a prevalent concern that existing rights of trial by jury in civil cases might be abolished or abridged by the new national government.[11] See *Colgrove* v. *Battin,* 413 U.S. 149, 152–156.

[11] Some of those who criticized the original Constitution for lacking any civil jury provision did not stop at portraying *federal* courts acting without juries: they also seemed to fear that Congress might override State law providing for jury trial in *State* courts. See, *e.g.*, George Mason in the Federal Convention, 1 Schwartz, *The Bill of Rights: A Documentary History* (1971), p. 438; Richard Henry Lee in his Letters of the Federal Farmer, 1 Schwartz 472–473; the anonymous author of the Letters of Brutus, 1 Schwartz 508–510; and see Edmund Randolph's reply to Patrick Henry in the Virginia ratifying convention, 2 Schwartz 778, 786.

The same concern is evident in the amendment proposed by the minority of the Pennsylvania ratifying Convention, which would secure civil jury trial (in specified cases) "as well in the federal courts, as in those of the several States." 2 Schwartz 658. (Whenever possible, we have cited to the reprint of the original documents in Professor Schwartz' very useful two-volume compilation. In each case, he indicates the more traditional source from which he has borrowed his text.)

The difficulty, or pretended difficulty, which prevented inclusion of a civil jury provision in the original Constitution was the variety of different State practices. *Id.* at 153. But it was never suggested that the Constitution should do more than *preserve* civil jury trial rights as they were recognized in State law. Accordingly, a survey of then effective State constitutional provisions dealing with trial by jury in civil cases must give us a strong indication of the boundaries of the concern.

1. Between 1776 and 1783, each of the fourteen original States,[12] except Rhode Island and Connecticut, drafted new constitutions, and all but two of these revolutionary charters (the exceptions being those of New York and South Carolina) contained a provision guaranteeing the right to trial by jury in certain civil cases. The question is, what cases? The vague generalities of the New Jersey [13] and Maryland provisions [14] tell us nothing. Nor do the ambiguous articles

[12] For present purposes, we include Vermont which, though not officially admitted to the Union as a separate State until 1791, had declared its independence from New York by ordaining a constitution on July 8, 1777.

[13] The relevant provision of Article XXII of the New Jersey Constitution of 1776 is as follows: "* * * the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever." 1 Schwartz 260.

[14] Article XVIII of the Maryland Declaration of Rights of 1776, which prefaced the new Constitution of that date, provides: "That the trial of facts where they arise, is one of the greatest securities of the lives, liberties and estates of the people." 1 Schwartz 281. While the words "by jury" are omitted, they are understood.

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of the Georgia Declaration of Rights.[15] They do not expressly include government litigation and, at all events, plainly did not furnish the model for the Seventh Amendment. Indeed, New Jersey and Georgia suggested no amendment to the federal Constitution and Maryland's proposal was much more restricted than its vague constitutional provision might suggest.[16] We turn, accordingly, to the civil jury guarantees in the constitutions of the remaining six States.

We begin with the Declaration of Rights with which Virginia prefaced her new Constitution of 1776. It is first in time and generally considered first in importance as the model for the Bill of Rights, whose prime author was of course James Madison of Virginia, himself a minor participant in the drafting of the Declaration.[17] The relevant provision of that charter (Article 11) is in the following words (1 Schwartz 235):

> That in controversies respecting property, and in suits between man and man, the ancient trial by Jury is preferable to any other, and ought to be held sacred.

This language is obviously chosen to govern *private* litigation. We need hardly belabor the point that the reference to "suits between man and man" is inapt

[15] For the presumptively relevant provisions of the Georgia Constitution of 1777, see Articles XL–XLIV thereof in 1 Schwartz 298.

[16] See n. 29, p. 28, *infra*.

[17] See 1 Schwartz 230, 236–237, 250. The primary draftsman was George Mason. *Id.* at 232, 247, 250. Indeed, Mason's first draft of the civil jury provision is *verbatim* the same as the final version. See Art. 10 thereof, reproduced in *id.* at 243.

to describe disputes to which the government is a party. Arguably, the category of "controversies respecting property" is more open-ended. The more natural reading, however, is that it encompasses only private actions *in rem*, or *quasi in rem*, as distinguished from personal actions. It is not a formula which easily encompasses actions initiated by the government, certainly not the collection of monetary penalties. But we need not finally construe the words "controversies respecting property" since this clause of the Virginia provision (unlike the description "suits between man and man") was left aside by Madison when he drafted the Seventh Amendment. See pp. 31–32, *infra*.

In sum, the civil jury provision in the Virginia Declaration, on its face, is one limited to private litigation. Considering the distinguished members of the committee responsible for its drafting, this cannot be supposed to be inadvertent. If need be, we have confirmation in the 1776 convention's rejection of Jefferson's more inclusive proposals,[18] and Virginia's adherence to its formula through all the constitutional debates a decade later.[19] We must conclude that the

[18] Jefferson's suggested jury trial provisions, in relevant part, were these: "All facts in causes, whether of Chancery, Common, Ecclesiastical, or Marine law, shall be tried by a jury * * *"; and "All Fines and Amercements shall be assessed * * * by the verdict of a jury." 1 Schwartz 244.

[19] See the text of the civil jury amendment to the federal Constitution proposed by Virginia, quoted at p. 30, *infra*.

Virginia Declaration of 1776 deliberately confined the right to jury trial in civil cases to private actions.[20]

Nor was Virginia an exception to the general rule. In five other States, significantly including Pennsylvania and Massachusetts,[21] comparable constitutional provisions with respect to civil jury trials were adopted. In language as plain as Virginia's, each of them confined the guarantee to private suits, as the following texts sufficiently show:

Pennsylvania (Declaration of Rights of 1776, Art. XI, in 1 Schwartz 265)—

> That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred.

North Carolina (Declaration of Rights of 1776, Art. XIV, in 1 Schwartz 287)—

> That in all controversies at law, respecting property, the ancient mode of trial, by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.

[20] Even within that area, it should be noted, the constitutional mandate was deemed subject to exceptions, according to Edmund Randolph, who had been a member of the drafting committee and was writing after having served as Governor of Virginia, delegate to the Philadelphia Convention, and Attorney General of the United States. See his Essay reproduced in 1 Schwartz 248.

[21] The pre-eminence of Virginia and Massachusetts, and to a lesser extent Pennsylvania, in our early constitutional history is well known. They were in fact the three most populous States, whose Representatives in the First Congress accounted for more than a third of the whole, who could together block any congressionally sponsored constitutional amendment. See U.S. Constitution, Art. I, Sec. 2, cl. 3; Art. V.

Vermont (Declaration of Rights of 1777, Art. XIII, in 1 Schwartz 324)—

> That, in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury; which ought to be held sacred.

Massachusetts (Declaration of Rights of 1780, Art. XV, in 1 Schwartz 342)—

> In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high-seas, and such as relate to mariners wages, the legislature shall hereafter find it necessary to alter it.

New Hampshire (Bill of Rights of 1783, Art. XX, in 1 Schwartz 378)—

> In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless in causes arising on the high seas, and such as relate to mariners wages, the legislature shall think it necessary hereafter to alter it.

2. From these models for the federal Bill of Rights, we go to the Constitutional Convention in Philadelphia. There, as we know, apparently no one suggested inclusion of a jury trial guarantee in civil cases until very late. That cannot have been an oversight in light of the number of delegates who had played a part in

framing the State Constitutional texts we have just examined. We need only notice George Mason (as we have seen, the acknowledged prime author of the Virginia Declaration of Rights), Benjamin Franklin (who had presided over the Pennsylvania Convention of 1776) [22] and Nathaniel Gorham (a member of the committee that drew up the Massachusetts Declaration of Rights of 1780).[23] What is more, since Article III authorized the establishment of federal trial courts with a very wide civil jurisdiction, there was no escaping the question whether Congress should, or should not, be left free to withhold a right to a jury for these cases.[24] The mandate of jury trial for federal criminal trials included in the same Article must obviously have prompted any forgetful delegate to urge a like provision for civil cases, if that had been his intention. Nor was the disparity of State practices a real obstacle to formulating a constitutional rule to be uniformly applied in the *federal* courts—which, in the end, is what the Seventh Amendment did.

[22] See 1 Schwartz 275.

[23] See *id.* at 356, 359.

[24] Although the argument was later advanced that such a provision was "unnecessary" (*e.g.*, Hamilton in *The Federalist* No. 83), that proposition is demonstrably unsound when addressed to Congressional power over procedure in the lower *federal* courts, unless one simply meant, as one speaker put it, that "[t]he Representatives of the people may be safely trusted in this matter." See *Colgrove* v. *Battin*, *supra*, 413 U.S. at 153, n. 8. Here, unlike the area covered by the First Amendment, it was not even arguable that Congress lacked power in the absence of an express prohibition.

We must conclude that the omission of a civil jury guarantee in the original Constitution was a decision deliberately taken. When the matter was broached in the last days of the Convention, difficulties were interposed which were obviously exaggerated. The very brief debates, fully reproduced in this Court's *Colgrove* opinion, 413 U.S. at 153–154 n. 8, sufficiently show the prevailing mood of the delegates, every State without exception rejecting a civil jury trial amendment to Article III.[25]

3. This, of course, is not the end of the story. Resistance to the proposed Constitution developed and, as the Court noted very early, "[o]ne of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases." *Parsons* v. *Bedford*, 3 Pet. 433, 445. That complaint was voiced in most of the State ratifying conventions. But, significantly, in all the reported debates, not a single speaker, so far as we are able to discover, related the demand for preserving the civil jury to governmental litigation. Indeed, one suspects the civil jury trial issue was often invoked merely as an easy weapon with which to assault the Constitution,[26]

[25] See A. T. Mason, *The States Rights Debate: Antifederalism and Constitution* (1964), pp. 74–76.

[26] The absence of a civil jury provision made an effective argument because the defenders of the proposed Constitution could not successfully explain why they had deemed it necessary to include an express jury trial guarantee for criminal cases but omitted a corresponding guarantee for civil cases, except with the unsatisfactory excuse of disparate State practices.

obnoxious to many of the antifederalists on more fundamental grounds.[27] At all events, the focus of the concern with private lawsuits is fully revealed in the civil jury right amendments suggested by several States.

Including the unofficial minority report from the Pennsylvania Convention, there were seven such proposals. The civil jury amendments recommended by New York [28] and Maryland [29] are perhaps ambiguous. But the rest clearly deal with private cases only. Thus, Massachusetts, second in importance only

[27] See Mason at 95–97 and 101, n. 178.

[28] The amendment proposed by New York is as follows (2 Schwartz 913): "That the trial by Jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate."

[29] The principal amendment on civil jury trial proposed by the Maryland Convention is as follows (Art. 3, 2 Schwartz 732): "That, in all actions on debts or contracts, and in all other controversies respecting property, of which the inferior federal courts have jurisdiction, the trial of facts shall be by jury, if required by either party; and that it be expressly declared that the state courts, in such cases, have a concurrent jurisdiction with the federal courts, with an appeal from either, only as to matter of law to the Supreme Federal Court, if the matter in dispute be of the value of — dollars." Although that language may be deemed ambiguous as to whether it includes more than private litigation, it plainly was *not* intended to embrace "cases of revenue," probably then supposed to exhaust the category of federal government litigation. "Revenue" cases are separately dealt with, without mention of jury trial, in Article 4 of the proposed amendments, which, in relevant part, is as follows (2 Schwartz 733): "and there may be an appeal, in all cases of revenue, as well to matter of fact as law; and Congress may give the state courts jurisdiction of revenue cases, for such forms, and in such manner, as they may think proper."

to Virginia and the first State to recommend amendments to the new Constitution, suggested the following provision:

> In civil actions between citizens of different states, every issue of fact, arising in actions at common law, shall be tried by a jury, if the parties, or either of them, request it.[30]

This express limitation to diversity cases—exclusively private litigation—is obviously deliberate. The Massachusetts ratifying Convention—unlike some others—did not merely put forward the provision from its own Declaration of Rights: it fashioned new language, tailored to the new federal jurisdiction defined in Article III. But it did not attach jury trial to all such cases. Most relevantly, the drafters of the proposal exempted from trial by jury the whole category of "controversies to which the United States shall be a party," a jurisdiction which everyone conceded as appropriately given to the new federal courts.[31]

The New Hampshire Convention proposed identical

[30] 2 Schwartz 713.

[31] To be sure, this provision also omitted other categories of federal cases from the jury trial guarantee. Suits between American citizens and aliens, or foreign ambassadors, ministers and consuls, were presumably left out because of the fear that the jury would favor its own national. The exclusion of "federal question" cases probably reflects the view that causes of action created by written laws were not suits "at common law," which, alone, were meant to be embraced. That "common law" limitation of course explains the omission of "cases of admiralty and maritime jurisdiction."

language.[32] The remaining proposals, by the Pennsylvania minority,[33] Virginia[34] and North Carolina,[35] in the definition of the civil cases to which a right to trial by jury is secured, followed the familiar language of their own Constitutions: "controversies respecting property, and * * * suits between man and man." We have already shown that this formulation encompasses only private litigation.

The critical significance of these texts cannot be exaggerated. What they reveal is that no State ever suggested that the Federal Constitution should require jury trial in government litigation. On this issue, even the most dedicated antifederalists were content to guarantee the right to a civil jury in private cases only. Accordingly, it would be most extraordinary if the Seventh Amendment which emerged from these proposals should have been intended to have a wider scope.

4. But there is more evidence still. It is well known that the Federalist majority in the First Congress

[32] 2 Schwartz 761. The New Hampshire Convention, concluding its work in June, 1788, no doubt had before it the Massachusetts civil jury provision adopted in early February, and copied it. Like Massachusetts, New Hampshire did not propose the language of its own Declaration of Rights for inclusion in the Federal Constitution. Compare p. 25, *supra*.

[33] 2 Schwartz 658.

[34] 2 Schwartz 841.

[35] 2 Schwartz 967. In the case of North Carolina, the proposed amendment to the Federal Constitution now added the words "and in suits between man and man," omitted from its constitutional provision. Compare p. 24, *supra*. This confirms our reading of the earlier guarantee as comparable to the Virginia formula.

was less than enthusiastic about devoting its time to framing the Bill of Rights. It was done, with little debate and almost carelessly, only because some—especially Madison—deemed it right and politic to carry out pledges given.[36] But neither Madison—the acknowledged chief draftsman—nor any of his associates, were inclined to go beyond what was necessary to placate the opposition. It is clear the Bill of Rights proposal which the Congress ultimately framed went *no further* than what the State ratifying conventions had asked for. Indeed, in important respects, the recommendations were not implemented and many antifederalists were disappointed.[37]

The Seventh Amendment is certainly no exception. Together with other Articles of the Bill of Rights, a draft of the civil jury trial amendment was proposed by Madison in the House of Representatives during its first sitting. We must assume Madison had consulted the several proposals submitted by other States, but, quite naturally, he modelled his draft on the provision recommended by his native Virginia, which he had helped frame.[38] It was in these terms:

> In suits at common law, between man and man, the trial by jury, as one of the best securities to

[36] See Mason 92–97; 2 Schwartz 983–984.

[37] See, *e.g.*, the reports of the Virginia Senators, Richard Henry Lee and William Grayson, in 2 Schwartz 1186–1187, and letters describing the views of Patrick Henry in 2 Schwartz 1189, 1191–1192. See also Mason 96–97.

[38] See 2 Schwartz 765, 1007, 1008. Madison had been a member of the committee at the ratifying convention which drafted the proposed amendments. *Id.* at 839.

> the rights of the people, ought to remain inviolate.[39]

Once again, it is clear no more than private litigation was embraced. Had the words "between man and man" not later been dropped, the present debate would be foreclosed. But they *were* deleted and we must attempt to determine whether the change was meant to expand the scope of the provision.

Madison read his proposed amendments on June 8, 1789. In a very temperate speech,[40] he explored all the political and other reasons for acquiescing in what he termed a "moderate * * * revisal" of the Constitution.[41] But the House refused to interrupt other business to consider his proposals. There were speeches in opposition to any amendment;[42] from all sides, there were pleas for delay;[43] and there were arguments about procedure.[44] In the end, consideration was postponed without any debate on the particular proposals.[45] Six weeks later, when the matter came up again, the House reversed its previous decision and appointed a select committee, comprising one member from each of the then represented States.[46] It was in

[39] *Id.* at 1028.
[40] *Id.* at 1023–1034.
[41] *Id.* at 1025.
[42] *Id.* at 1017–1019, 1034–1036, 1039–1040, 1040–1041.
[43] *Id.* at 1017–1019, 1020, 1021, 1022, 1036, 1039.
[44] *Id.* at 1017, 1021, 1022–1023, 1034, 1038, 1040, 1041–1042.
[45] *Id.* at 1042.
[46] *Id.* at 1050, 1054, 1057–1061, Rhode Island and North Carolina had not yet ratified the Constitution and were therefore not represented. Vermont was not yet recognized as a separate State.

that committee that the text of the Seventh Amendment was shortened by deleting the words "between man and man."

The civil jury proposal reported by the Committee of Eleven (as it came to be called) read as follows:

> In suits at common law, the right of trial by jury shall be preserved."[47]

When we compare this provision with Madison's draft, it is obvious the committee was condensing and sharpening language. The florid phrase "as one of the best securities to the rights of the people" is deleted as surplusage. And the shorter and more direct mandate "shall be preserved" is substituted for "ought to remain inviolate." We suggest the omission of the words "between man and man" served a like purpose: stylistic improvement only, not change of substance.

Unfortunately, we have no record of the proceedings of the Committee of Eleven. But we are not without some indication whether that body intended to extend the coverage of the proposed amendments. We know that the committee completed its work very rapidly, in a single week.[48] Although they were required also to consider the State proposals that were omitted from Madison's draft,[49] it is obvious the

[47] 2 Schwartz 1117. Except for the later insertion of the twenty dollar limitation and the addition of the second clause by the Senate (see p. 39, n. 62, *infra*), this is, of course, the final text of the Seventh Amendment.
[48] 2 Schwartz 1050, 1054, 1061.
[49] *Id.* at 1061.

members decided to confine their work to improving that draft. As Professor Schwartz has said:

> It is fair to say that the Committee version made no substantial alteration in the original Madison draft. The Committee did, however, make certain stylistic changes which brought the amendments closer to the final Bill of Rights version. The most important of these are: the direct use of the term "freedom of speech, and of the press"; the change to what was to be language of the Just Compensation Clause of the Fifth Amendment; the use of almost the exact language ultimately contained in the Ninth Amendment; and the adoption of the substance of what was to be the language of the Seventh Amendment. These changes scarcely alter the fact that the Committee version was a virtual restatement of the amendments proposed by Madison.[50]

In sum, there is no reason to believe the Committee of Eleven did more than condense and sharpen the language of the original draft. Certainly, with respect to the provision that became the Seventh Amendment, the Committee had no reason to go further, since, as we have seen, no State had proposed a broader civil jury trial provision. Moreover, to the extent that State practices differed, or that some jury trial proposals were more encompassing than others, the normal course of political compromise suggests that Congressmen would have settled on the narrow common ground. This, of course, was all the more appropriate

[50] *Id.* at 1050.

in writing a *constitutional* rule—which could always be expanded by subsequent legislation.

Our conclusion is confirmed when we look at the membership of the select committee. Many were declared Federalists,[51] and all but one of the others [52] were supporters of the unamended Constitution.[53] And, even if any member had sought to widen the scope of the proposed amendments, it is sure that the committee as a whole, under the influence of Chairman Vining, Madison and Sherman—its only prominent men—would have rejected such an effort. Indeed, some two weeks after the committee draft of

[51] Madison aside, the avowed Federalists were Abraham Baldwin of Georgia, Nicholas Gilman of New Hampshire, George Clymer of Pennsylvania, and Benjamin Goodhue of Massachusetts. See *Biographical Dictionary of the American Congress, 1774–1971* (G.P.O. 1971) pp. 544, 756, 1005, 1014.

[52] Aedanus Burke of South Carolina, who, after the report of the committee, repeatedly sought to have the House accept further amendments. See 2 Schwartz 1103, 1109, 1114, 1117, 1128.

[53] Besides Madison, there were: Roger Sherman of Connecticut, who had signed the original Constitution; George Gale of Maryland and Elias Boudinot of New Jersey, each of whom had supported the Constitution in their respective State ratifying conventions (see 2 Schwartz 729, 736, 737, 674; *Biographical Dictionary, supra*, at 615, 980, 1689); Egbert Benson of New York, a political ally of Hamilton, described as "a zealous advocate of the adoption by his state of the draft from the Philadelphia Convention" (2 *Dictionary of American Biography* (1929), p. 204; Main, *The Antifederalists* (1961), p. 48); and, finally, John Vining of Delaware, the chairman of the committee, who early expressed his hostility to any amendment (see 2 Schwartz 1022–1023).

The stance of the several committee members is perhaps sufficiently revealed in their votes—all opposed except Burke—on the motion to amend what is now the Tenth Amendment by adding the word "expressly" before "delegated." See 2 Schwartz 1124, 1127.

the amendments had been reported, Aedanus Burke of South Carolina, the only antifederalist member, complained (2 Schwartz 1103):

> I am very well satisfied that those [amendments] that are reported and likely to be adopted by this House are very far from giving satisfaction to our constituents; they are not those solid and substantial amendments which the people expect; they are little better than whip syllabub, frothy and full of wind, formed only to please the palate; or they are like a tub thrown out to a whale, to secure the freight of the ship and its peaceable voyage. In my judgment, the people will not be gratified by the mode we have pursued in bringing them forward. There was a committee of eleven appointed; and out of the number I think there were five who were members of the convention that formed the constitution. Such gentlemen, having already given their opinion with respect to the perfection of the work, may be thought improper agents to bring forward amendments. Upon the whole, I think it will be found that we have done nothing but lose our time, and that it will be better to drop the subject now, and proceed to the organization of the Government.

No doubt, Mr. Burke was overstating the case. We do not suggest that the Seventh Amendment, as it emerged from the Committee of Eleven, was mere "whip syllabub." But it would be equally unjustifiable, in our view, to claim that the Committee had transformed a limited guarantee of jury trial in private

civil cases into a strong shield against governmental oppression.

5. Finally, it is instructive to notice what happened after the Committee of Eleven had completed its work. The House began consideration of the draft amendments on August 13, but the whole of that day was consumed with pleas for postponement and a long debate whether the proposed changes should be incorporated into the body of the Constitution (as the committee, supported by Madison, suggested) or appended as separate provisions (as Sherman insisted was necessary and proper).[54] In the ensuing days, the House, first sitting as a committee of the whole and then in legislative session, considered each of the proposals in turn.[55] Significantly, in every other case, changes in the text of the committee draft were urged, whether successfully or not.[56] But, not so with respect to the civil jury provision: both in commit-

[54] See 2 Schwartz 1062–1075. On the question of form, Madison prevailed (*id.* at 1075), but only for the time being. Sherman won his argument a week later (*id.* at 1126).

[55] 2 Schwartz 1076–1138.

[56] While the House sat in committee of the whole, changes were suggested in the draft provisions that were to become the First Amendment (2 Schwartz, 1088–1107), the Second (*id.* at 1107–1110), the Third (*id.* at 1110), the Fourth (*id.* at 1112), the Fifth (*id.* at 1110–1112), the Sixth (*id.* at 1112–1113, 1114, 1116–1117), the Eighth (*id.* at 1111–1112), the Ninth (*id.* at 1112), and the Tenth (*id.* at 1118). In plenary session, further changes were proposed to the amendments which are today the First (*id.* at 1126), Second (*id.* at 1126–1127) and the Tenth (*id.* at 1127–1132).

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tee [57] and in the plenary session,[58] the draft was adopted without debate and without suggestion of change. Nor did anyone question, or explain, why the committee had shortened the language of the Madison draft. The inference is strong that the two versions were accepted as carrying the same meaning.

The remaining stages in the adoption of the Seventh Amendment may be taken briefly. After a small committee of the House had re-arranged the surviving amendments as new articles to be added to (rather than incorporated in) the Constitution, and that work had been formally approved, the proposals were sent to the Senate.[59] We know little of what happened there because the debates were not then public and the Journal records only the action taken. But, considering their action on other proposed amendments, that body [60] cannot be supposed to have approved a civil jury trial provision which was understood as going further than what the States had suggested. The Senators did not hesitate to cut back other provisions and even to delete the two criminal jury proposals.[61] Indeed, they did limit the applica-

[57] The proposal, then described as "the 3d clause of the 7th proposition," was, according to the Annals of Congress, "considered and adopted," without further ado, on August 18. 2 Schwartz 1117.

[58] In the House, sitting legislatively, the proposal is recorded as having been "adopted without debate" on August 21. 2 Schwartz 1127.

[59] See 2 Schwartz 1125, 1138.

[60] See *id.* at 1145–1147.

[61] *Id.* at 1145–1146, 1147. The House had framed two separate amendments guaranteeing trial by jury in criminal cases, the first inhibiting *State* action (Article 11, 2 Schwartz 1123), the other

tion of the civil jury amendment by adding the twenty dollar provision.[62] We assume they would have added other restrictive language if they had thought the provision as written reached more than private "legal" cases.

When the Senate's changes reached the House, they were not all agreed to and a conference became necessary.[63] The House did, however, immediately accept the Senators' twenty dollar limitation on civil jury trial [64] and we therefore have no interest in the further proceedings in the Conference and in the two houses.[65] We note only that Madison was the chief Manager on behalf of the House at the Conference,[66] and, that, despite the additional opportunities afforded, neither he nor any member of the House or Senate suggested any change in the text of the Seventh Amendment, presumably because the present revision was deemed no different in substance from Madison's original draft. And the same remark can be made with respect to the ratification of the Amendment by the several States, all agreeing to the civil

governing prosecutions by the *national* government (Article 14, *id.*). Both were deleted in the Senate (*id.* at 1149, 1150, 1154, and see Madison's letter to Pendleton, *id.* at 1157), but the second was ultimately restored (*id.* at 1159, 1160, 1162, 1163–1165).

[62] *Id.* at 1146–1147, 1150, 1154. Consistent with its effort to consolidate the House amendments into a lesser number, the Senate added the second clause—formerly a separate article—to the Seventh Amendment. *Id.* at 1154.

[63] *Id.* at 1154, 1155, 1162.

[64] *Id.* at 1160.

[65] *Id.* at 1162–1166.

[66] *Id.* at 1162.

jury provision without apparently suspecting that it might later be read to reach further than the proposals that some of those States had recommended to Congress.[87]

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6. We have sought to show, primarily by reference to the texts which served as models for the Seventh Amendment, that those who framed that provision never meant to burden government litigation with the requirement of jury trial, *as a matter of constitutional imperative*. It is a fair question, however, how this accords with the apparent lesson of recent colonial history. Was not the main impetus for the Seventh Amendment, as petitioners suggest (Pet. Br. 20–31), a desire to interpose a civil jury between the citizenry and the government's judges? Our answer is that there is not a shred of evidence supporting the argument. To be sure, it is familiar history that, in the decade before Independence, Americans inveighed against the practice of assessing and enforcing fines and forfeitures through so-called "vice-admiralty" courts without juries. That is sufficiently reflected in public remonstrances from 1765 through 1776.[88] But it does not

[87] See *id.* at 1171–1203. Connecticut, Georgia and Massachusetts, having failed to act before the requisite number of ratifications had been filed, did not formally ratify the Bill of Rights until 1939. See 2 Schwartz 1172, 1201, 1203.

[88] See, e.g., the Stamp Act Congress' Declaration of Rights and Grievances (Arts. VII and VIII, in 1 Schwartz 195, at 197); John Adams' argument in *Sewall* v. *Hancock* (Pet. Br. 28–29); Samuel Adams' declaration of The Rights of the Colonists and a List of

follow that the Seventh Amendment was a response to that concern.

Whether rightly or wrongly, the members of the federal Constitutional Convention deemed the criminal jury provision of Article III (later reinforced by the Sixth Amendment) a sufficient constitutional shield against a repetition of governmental oppression during the colonial period. As Hamilton explained in No. 83 of *The Federalist*:

> I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas-corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for, in the most ample manner, in the plan of the convention.

The same thought was repeated in at least some of the State ratifying conventions. We need only notice what

Infringements and Violations of Rights (1 Schwartz 199, at 209); (Preamble, Res. 5 and Res. 11, in 1 Schwartz 214 at 215, 217, 218); the Declaration and Resolves of the First Continental Congress the Continental Congress' Address to the Inhabitants of Quebec (1 Schwartz 221, at 222–223); and the Declaration of Independence (1 Schwartz 251, at 253).

was said by Mr. Gore in the Massachusetts Convention [69] and by Governor Randolph in that of Virginia.[70]

It may be objected that these remarks are somewhat disingenuous in that they ignore the possibility of national officials—like their British predecessors—wishing to by-pass juries in *civil* proceedings to collect revenue and enforce customs, trade and immigration regulations. Why did not the Founding Fathers deem it necessary to guard against that danger?

In part, the answer must lie in the fact that we were now our own rulers, not colonials rebelling against a distant and arbitrary Crown and Parliament, and the

[69] 2 Schwartz 691, 692:

"Very few governments (certainly not this) can be interested in depriving the people of trial by jury, in questions of *meum et tuum*. In criminal cases alone are they interested to have the trial under their own control; and, in such cases, the Constitution expressly stipulates for trial by jury;

* * * *

"Gentlemen have compared the article under consideration to that power which the British claimed, and we resisted, at the revolution; namely, the power of trying the Americans without a jury. But surely there was no parallel in the cases; it was criminal cases in which they attempted to make this abuse of power."

[70] 2 Schwartz 786–787:

"The trial by jury is supposed to be in danger also. It is secured in criminal cases, but supposed to be taken away in civil cases. It is not relinquished by the Constitution; it is only not provided for. Look at the interest of Congress to suppress it. Can it be in any manner advantageous for them to suppress it? In equitable cases, it ought not to prevail, nor with respect to admiralty causes: because there will be an undue leaning against those characters, of whose business courts of admiralty will have cognizance. I will rest myself secure under this reflection—that it is impossible for the most suspicious or malignant mind to show that it is the interest of Congress to infringe on this trial by jury."

recalcitrance of citizens during the Revolutionary War had taught the Framers the practical necessities of effective government. Even without a constitutional restraint, we would not oppress our own citizens. As Randolph put it, "Why distrust ourselves?" [71] Moreover, an independent judiciary with life tenure was now provided for and the abuses of judges removable at whim by the Crown were no longer to be feared. And, finally, as speakers said many times,[72] this was a matter for legislation, not to be frozen in the Constitution. We may invoke James Iredell, later a member of this Court, speaking to the North Carolina ratifying convention (2 Schwartz 941):

> Gentlemen will be pleased to consider that there is a material difference between an article fixed in the Constitution, and a regulation by law. An article in the Constitution, however inconvenient it may prove by experience, can only be altered by altering the Constitution itself, which manifestly is a thing that ought not to be done often. When regulated by law, it can easily be occasionally altered so as best to suit the conveniences of the people.

The Seventh Amendment does not represent a complete reversal of that view—else it would have been much more controversial. It dealt only with that private litigation where a civil jury had been traditional, which the federal courts might now entertain by virtue of the diversity jurisdiction. All other cases, in-

[71] 2 Schwartz 786.

[72] See, *e.g.*, 2 Schwartz 691, 693, 940.

cluding the new field of litigation involving the federal government, were left to be provided for by legislation. Jefferson,[73] apparently almost alone, would have written a broader provision. But, as we have already noted, it was not such radicals who framed the Seventh Amendment. Fidelity to the original understanding does not permit us to read the present text in total disregard of the very limited objective of those who wrote it.

B. THE FIRST JUDICIARY ACT

A further objection to our reading of the Seventh Amendment is said to lie in the provisions of the First Judiciary Act which recognize a right to jury trial in "suits for penalties and forfeitures." (Pet. Br. 23). It is said that, since the members of the First Congress who wrote the Judiciary Act were the framers of the Amendment, it is reasonable to treat the one as construing the other. And decisions of this Court are cited in support of that course (Pet. Br. 22). The flaw in the argument is the assumption that Congress acted as a matter of *constitutional compulsion.*

[73] We have already noticed the more comprehensive jury trial provisions in Jefferson's draft for a Virginia Declaration of Rights in 1776—not adopted by the State Convention. See p. 23, n. 18, *supra*. Apparently, Jefferson never wavered in that view. See his letter to Madison of December 20, 1787 (1 Schwartz 605, at 607); his letter to C.W.F. Dumas, 1788 (1 Schwartz 613); and his letter to Madison of August 28, 1789, criticizing the latter's draft bill of rights and suggesting a more inclusive civil jury provision (2 Schwartz 1140, at 1143). But, as we know, Jefferson was absent in Paris during all the relevant constitutional debates and his suggestions were not taken up.

Strictly speaking, of course, the Seventh Amendment did not come into force until two years after the Judiciary Act became law.[74] Moreover, while the Amendment was framed in the House, the statute was written in the Senate, where the political balance was somewhat different.[75] Nevertheless, it is reasonable to suppose the Congress as a whole would not have passed a law which they deemed inconsistent with a constitutional provision they were recommending to the States. But there is no inconsistency. Neither the Seventh Amendment nor any other clause of the Constitution barred the national legislature from going further in the matter of civil jury trials than was

[74] The Judiciary Act, having been passed by the Senate on July 17, 1789 (1 Annals of Congress 50) and by the House, without amendments, on September 17 (*id* at 894), was signed into law by the President on September 24 (1 Stat. 73, 93). The Seventh Amendment, together with the other Amendments constituting the Bill of Rights, was not ratified by the requisite number of States until December 15, 1791 (2 Schwartz 1172, 1202).

[75] When the Judiciary Act was passed by the Senate there were only twenty Senators sitting, North Carolina and Rhode Island not having yet ratified the Constitution and the Senators from New York not having yet been seated. See 1 Annals of Congress 49, 50. Of these, only seven were elected as Federalists (Bassett of Delaware, Carroll of Maryland, Ellsworth of Connecticut, Elmer of New Jersey, Paterson of New Jersey, Strong of Massachusetts, and Wingate of New Hampshire, see *Biographical Dictionary*, *supra*, 562, 710, 911, 912, 1514, 1769, 1944). Others, including Grayson and Lee of Virginia, were hostile to a strong federal government. See p. 34, n. 37, *supra*. The majority were moderates and their acquiescence in the establishment of inferior federal courts with substantial jurisdiction may well have required a broad jury trial guarantee.

constitutionally required. In the absence of evidence, it would be quite wrong to conclude the Congress was providing trial by jury only where it believed it must.

The legislative history of the Judiciary Act provides no such proof. On the contrary, there are indications the other way. At no point in the recorded debates,[76] was it suggested that the Congress was according civil litigants a right of trial by jury as a matter of constitutional compulsion. And, although making a different point, one speaker expressed what may well have been the general understanding, that actions authorized by federal statutes were not suits at "common law.'"[77]

What is more, the very text of Section 9 of the Act (on which petitioners rely) supports that view. That section not only gives a right to trial by jury in penalty and forfeiture cases, but, also—and quite separately—in "all suits at common law where the United States sue." Presumably, the drafters did not consider penalty and forfeiture actions "suits at common law"—else there was no reason separately to provide for them.[78] If that is so, it must follow that the right to a jury in such actions was given as a matter of legislative grace, not constitutional mandate, since the Seventh Amendment controls only "suits at common law."

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[76] We have only a portion of House debates. See 1 Annals of Congress 782–785, 796–820, 820–834.

[77] See 1 Annals of Congress 808 (1789).

[78] We note that the distinction remains in the Judicial Code today. See 28 U.S.C. 1345, 1355. And see 28 U.S.C. 1340, separately conferring jurisdiction in tax cases.

These provisions, it is true, may be invoked to show that at least *some* litigation initiated by the government was viewed as encompassed by the phrase "suits at common law." At best, however, that would suggest the narrower submission we outline in a moment; it would not avail petitioners here. But, in fact, this Court has settled that the expression "suits at common law" in the Seventh Amendment has a narrower scope than the same words in the Judiciary Act.

When we look at Section 11 of the Act[79]—which defines the jurisdiction of the circuit courts—we notice that those courts are given competence to hear "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners." The question presented in *Kohl* v. *United States,* 91 U.S. 367, was whether this provision authorized the circuit courts to hear condemnation actions, and an affirmative answer was given on the ground that they were "suits at common law" within the statute.[80] And yet (as we discuss in a moment), it is settled that eminent domain proceedings are not controlled by the Seventh Amendment. It is thus apparent that the Judiciary Act is not a safe guide to construing the Amendment—even when the same words are used.

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[79] 1 Stat. 73, 78.

[80] At the time, there was no separate jurisdictional provision for eminent domain cases. The first predecessor to the present 28 U.S.C. 1358 was not enacted until 1888. See "Legislative History" note to that section in U.S. Code (1970 ed.), vol. 7, p. 7576.

There is, finally, a further indication, on the face of the text, that the Judiciary Act was more generous in the matter of jury trials than the Constitution required. Indeed, the first clause of Section 9 grants the district courts a very limited criminal jurisdiction, specifying, *inter alia*, that no fine shall exceed one hundred dollars nor any term of imprisonment exceed six months, and the last clause of the section provides for jury trial in such cases. Yet, neither Article III nor the Sixth Amendment reaches such petty offenses.[81] Once again, therefore, Congress went beyond the constitutional mandate. And if it did so in criminal cases, is it not probable it acted likewise in civil?

To be sure, it may seem strange that a Congress dominated by Federalist sentiments should go so far beyond what was (or soon would be) constitutionally mandated. But it is not really remarkable that, while balking at *constitutionalizing* trial by jury too broadly, the legislature should be willing, perhaps only experimentally, to be more generous in a repealable statute. After all, the debate on the Bill of Rights had in large part focused on congressional power. Many had opposed constitutional amendments that would restrict discretion, while at the same time arguing that the Congress could be trusted to reach the same result legislatively.[82]

[81] See *Baldwin* v. *New York*, 399 U.S. 66, 68–69; 18 U.S.C. 1; Mag. R., Rule 3(c)(1).

[82] See, *e.g.*, Hamilton in *The Federalist*, No. 83.

The written record is too meager to reveal the motives of the First Congress. But there are very plausible explanations for its different treatment of jury trial in the Judiciary Act and the proposed Sixth and Seventh Amendments. Perhaps the members of the House and Senate were conceding here, for the time being, what they thought expedient to encourage ratification of the Constitution by the two reluctant States of North Carolina and Rhode Island and to conciliate strong feelings elsewhere. Or it may be that the concession of jury trial in most civil cases and all criminal cases was part of a political compromise in which this was the price exacted from the advocates of a broad federal jurisdiction by those who opposed investing the lower federal courts with more than a very minimal authority.[83] We must remember that, when it came to enacting the Judiciary Act, the anti-federalists were in a much stronger position than they were on the question of amending the Constitution. It was now they who could delay the legislation until concessions were made. And, on the other hand, their proposals could not be blocked—as in the case of constitutional reform—by a mere one-third of the members.

We need not pursue the matter. It is plain enough, in our submission, that the jury trial provisions of

[83] Judging from the debates in the House, there was, indeed, considerable opposition to creating lower federal courts or investing them with more than admiralty jurisdiction. See 1 Annals of Congress 783–785, 796–797, 801–804, 812, 813–815, 820–821, 822–827, 829–831, 832–833 (1789).

the First Judiciary Act tell us no more about the scope of the Seventh Amendment than they do about the Sixth. We do not say that the inclusion of the broad jury trial provision in Section 9 proves that the Constitution itself did not mandate that result. On the other hand, it is hardly evidence to the contrary: to label the provision wholly superfluous is not the best compliment to the First Congress.

C. THE DECISIONS OF THIS COURT

1. No doubt, it will be said that our argument is contrary to the judgment of this Court in *Parsons* v. *Bedford,* 3 Pet. 433. But that would be a gross overstatement. *Parsons* was an ordinary private lawsuit for the price of goods sold and delivered. And the only necessary holding was that, the facts having been tried by jury, the second clause of the Seventh Amendment (which is *not* involved here)[84] precluded this Court from reviewing them. Accordingly, the disregard of a local law, apparently applicable to federal courts sitting in the State, which required the testimony of witnesses to be recorded, was, in effect, harmless error. Plainly the decision in *Parsons* does not remotely clash with our submission.

There is, to be sure, a further ruling that the action in *Parsons* was a "suit at common law" within the meaning of the Seventh Amendment. But the opinion itself seems to treat this as unnecessary to the

[84] "* * * and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common Law."

result, on the ground that the second clause of the Amendment is a "substantial and independent clause" (3 Pet. at 447)—a statement which, in context, suggests a view that no federal court may re-examine facts found by jury, whether or not a jury trial was mandated by the first clause of the Amendment.[85] And, in any event, that ruling, whether necessary or not, is no embarrassment to our argument. The Court merely concluded that a private suit on a debt, which elsewhere would be a classical common law action, does not escape the Seventh Amendment simply because it arises in Louisiana where the "civil law" obtains. We do not quarrel with that proposition.[86]

Unfortunately, however, in reaching this conclusion the Court indulged in rather sweeping language. It was first said that the expression "suits at common law" in the Seventh Amendment was to be read as equivalent to the words "all cases in law" in Article III, and therefore as embracing all controversies not of equity or admiralty jurisdiction. 3 Pet. at ~~436~~ 447. 446 And the Court went on to notice the provisions of the

[85] This appears to be an open question in this Court. The opinion in *The Justices* v. *Murray*, 9 Wall. 274, while emphasizing the independence of the two clauses in ruling that the second clause governs this Court in reviewing the decisions of State courts—where jury trial is not constitutionally required—nevertheless seems to assume that the prohibition applies only to cases that *would be* governed by the Seventh Amendment if tried in a federal court. *Id.* at 279. But see *Colgrove* v. *Battin*, *supra*, 413 U.S. at 152, n. 6.

[86] Indeed, it it were otherwise, after *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, the Seventh Amendment would presumably have no application whatever to diversity cases in federal courts sitting in Louisiana.

Judiciary Act that provide for jury trial of all cases not in equity or admiralty. 3 Pet. at 447. It is these passages which petitioners invoke.

Read uncritically, this portion of the *Parsons* opinion does, indeed, support petitioners. But too much is made of Mr. Justice Story's words. In the context of *private* litigation—which is all he was dealing with—the argument may be unexceptionable. It would be wrong, however, to suppose the Court was purporting to announce a rule controlling the enforcement of governmental regulations. There is, as it happens, an indication to the contrary in the opinion itself. Explaining that the Seventh Amendment does not govern admiralty cases, Mr. Justice Story gives, as one reason, that they involve an admixture of "public law." 3 Pet. at 447. Is that not, at the least, a hint that the Court understood governmental litigation to be outside the sweep of the Seventh Amendment?

At all events, we submit the Court ought not be bound by the casual *dictum* of the *Parsons* opinion, delivered in a case where the present issue did not arise and was not argued. And, for the same reason, the Court, in our submission, is free to disregard subsequent repetitions of that *dictum*. See, *e.g.*, *Capital Traction Company* v. *Hof*, 174 U.S. 1, 8–10; *Ross* v. *Bernhard*, 396 U.S. 531, 533; *Curtis* v. *Loether*, 415 U.S. 189, 193. In none of the cited cases was the quoted passage from *Parsons*, if construed to reach government litigation, necessary to the result.

2. There is, in fact, no decision of this Court which squarely controls our submission. We must acknowledge, however, that the Court appears often to have assumed the contrary. Indeed, there are at least two cases in which the opinion explicitly concedes the application of the Seventh Amendment to a suit by the United States to collect a civil penalty. The first of these is *Hepner* v. *United States*, 213 U.S. 103, in which it is said that "[t]he defendant was, of course, entitled to have a jury summoned." *Id.* at 115. The other decision is *United States* v. *Regan*, 232 U.S. 37, where the Court notes that "the defendant was entitled to have the issues tried before a jury" because "in a civil action of debt involving more than twenty dollars a jury trial is demandable." *Id.* at 47.

We stress, however, that these statements were not strictly necessary to the decision. In both *Hepner* and *Regan*, the claim advanced, and rejected by this Court, was that guarantees applicable to *criminal* prosecutions—immunity from a directed verdict of conviction or proof beyond a reasonable doubt for conviction—should have obtained because the government's action for a monetary penalty alleged violation of criminal statutes. And the Court's comments about a right to trial by jury were gratuitous, a jury trial having in fact been afforded in each case. Moreover, it seems plain that point was never at issue.

Nevertheless, it is not without hesitation that we ask the Court to repudiate the assumption underlying *Hepner* and *Regan*, and perhaps other cases. We do so only because it appears that the Court has never been presented with the evidence which would afford it the opportunity to test that assumption.

However long acquiesced in, a proposition of constitutional law which has not been fully considered ought to be open to re-examination. See, *e.g.*, *Williams* v. *Florida*, 399 U.S. 78, 86–103; *Apodaca* v. *Oregon*, 406 U.S. 404, 407–410 (opinion of White, J.). Cf. *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 379–388, 403–405.

3. It may be, moreover, that our submission affords a firmer basis for the decisions of this Court dealing with the mode of trial in civil controversies involving the national government. The Court has always recognized the constitutional propriety of resolving such controversies without the intervention of a jury. But an apparent distinction has been drawn between suits *against* the sovereign, where jury trial has been held unnecessary *regardless* of the forum, and, on the other hand, proceedings in which the government is seeking to collect a monetary award, where, it seems to be assumed, the judicial or administrative character of the forum selected constitutionally determines whether the citizen may insist on jury trial. The rationale for that distinction is not self-evident, and it, of course, becomes unnecessary if we are right in submitting that the Seventh Amendment has no application whatever to government litigation.

We turn, first, to the well-settled rule that suits against the United States, although seeking a monetary award and filed in the ordinary courts,[27] are exempt from the strictures of the Seventh Amendment. Why should it be so, if (contrary to our submission) the Amendment generally applies to government litigation?

The principal rationale given in the cases is that, because of the prevailing doctrine of sovereign immunity, such proceedings were unknown to the common law and thus "are not suits at common law within [the] true meaning [of the Amendment]." *McElrath* v. *United States*, 102 U.S. 426, 440; *Galloway* v. *United States*, 319 U.S. 372, 388; *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572. But there is, perhaps, a more fundamental reason for the rule.

After all, the common law, if understood to encompass everything not equity or admiralty and to be capable of legislative amendment, always had power to waive the bar of sovereign immunity. See *Glidden*

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[27] Suits against the United States in the district courts, whether under the Tucker Act, the Tort Claims Act, or the Internal Revenue Code (for a time), were tried without a jury. As a matter of legislative grace, a right of trial by jury was given in tax refund suits (see *Wickwire* v. *Reinecke*, 275 U.S. 101, 105); but other actions against the United States continue to be heard by the judge alone. 28 U.S.C. 2402. Of course, no right of trial by jury obtains in the Court of Claims (28 U.S.C. 2503, 2505), the Tax Court (26 U.S.C. 7441 *et seq.*) or the Customs Court (28 U.S.C. 2638). See *Phillips* v. *Commissioner*, 283 U.S. 589, 599, n. 9.

Company v. *Zdanok*, *supra*, 370 U.S. at 563. Are suits under the Tucker Act and the Torts Claims Act not governed by the Seventh Amendment only because those statutes were enacted after 1791? If so, the same exemption ought to obtain in any diversity suit under a more recent State Lord Campbell's Act, or any death action under the F.E.L.A. or the Jones Act, on the sole ground that the common law, unaided by statute, knew no action for wrongful death. Yet, we suppose no one suggests that result. Cf. *A. & G. Stevedores* v. *Ellerman Lines*, 369 U.S. 355, 360; *Schulz* v. *Pennsylvania R. Co.*, 350 U.S. 523, 524. One must wonder also why the United States is exempt from trial by jury when it counterclaims in a Tucker Act suit. *E.g.*, *McElrath*, *supra*. Is it really because the government claim—although entirely independent of the plaintiff's case, as it may be[*]—is "incidental," or because such a rule is necessary "to obviate the need for multiple litigation" (*Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 572)? That explanation is difficult to square with the holding of *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, and *Dairy Queen* v. *Wood*, 369 U.S. 469.

It is said that because the sovereign is free not to be sued at all, it may condition its consent as it pleases, "declar[ing] in what court it may be sued, and prescrib[ing] the forms of pleading and the rules of practice to be observed in such suits." *McElrath*, *supra*, 102 U.S. at 440. By a parity of reasoning, it should follow that whenever Congress is constitutionally free to enforce its regulations by monetary exac-

[*] See 28 U.S.C. 1346(c), 1503, 2508.

tions without invoking the judicial power at all (see pp. 61 ff., *infra*), it may withhold trial by jury from the defendant when it *does* use the courts in such cases. But that result can be squared with the Seventh Amendment only if the Amendment does not control governmental litigation.

Even more difficult to rationalize is the proposition, now accepted (see *United States* v. *Reynolds*, 397 U.S. 14, 18–19; *Bauman* v. *Ross*, 167 U.S. 548, 593), that the Seventh Amendment gives no right of trial by jury in eminent domain proceedings. The seminal case is *Kohl* v. *United States*, *supra*, which (as we have seen) holds that, for jurisdictional purposes, a condemnation action *is* "a suit at common law, when initiated in a court." 91 U.S. at 376. But, because the Court also noted that, like many other civil "proceedings at common law," condemnation was not traditionally "enforced through the agency of a jury" (*ibid.*), Kohl has been invoked as holding that the Seventh Amendment is inapplicable. See 5 Moore's *Federal Practice*, ¶38.32 [1], pp. 243–244 (1976). We suggest a more satisfactory basis for the rule is simply that the Seventh Amendment was never intended to reach the sovereign's litigation.

4. We have already noted that, in most, if not all, cases in which the government, pursuing a legitimate legislative purpose, wishes to avoid the risks and delays of a civil jury trial in recovering money or property, that result can be achieved by the simple expedient of employing an administrative, instead of a judicial, process. There may be constitutional inhibi-

tions on confiding the adjudication of purely private disputes to administrative tribunals. But where public rights are involved—especially when government itself is directly enforcing its regulations—Congress is entirely free to rely on the administrative process without trial by jury.

There is, of course, nothing new or startling in that conclusion. As we detail in a moment (pp. 61 ff, *infra*) few propositions are more firmly settled in this Court's jurisprudence. Yet, it is not easy to reconcile such a rule with the assumption that the Seventh Amendment was meant to interpose a screen of ordinary citizens between the government and the people in civil cases. We suggest that the true reason why government may enforce its civil laws without a jury trial, even where money or property is involved, is that the Seventh Amendment has no application to such controversies, *whatever the forum*. We repeat our primary submission that, read against the history of its framing, the Amendment's preservation of the right to a civil jury in "suits at common law" is confined to private cases. In sum, we contrast "public law" and "common law."

b. Possible exceptions

We have thus far argued that the present cases are beyond the reach of the Seventh Amendment because the government is a party. If that is right, it makes an end of the matter. However, should that be deemed

too broad a rule of exclusion, one is tempted to make a somewhat narrower submission: that, regardless of the forum used, government litigation is exempt from the strictures of the Seventh Amendment only when the government is not merely standing in the same position as a private plaintiff, claiming by virtue of general law which is equally available to individuals.

The exact boundaries of the rule we now suggest are difficult to fix. But the point can be illustrated by positing the two extremes: a suit by the United States to recover for damage to one of its vehicles, invoking the ordinary law of torts; and a proceeding by the sovereign, under the revenue laws, to collect taxes. In the first case, the government is not purporting to be acting as such, but simply as any other person whose property was negligently damaged, resorting to the general law to be made whole. Notwithstanding the character of the plaintiff, this might be said to fit the description of a "suit at common law." In the revenue case, on the other hand, an exclusively governmental power is involved and the law invoked is not general or "common," but is a specially created weapon which only the sovereign is entitled to use.

This approach is perhaps suggested by the contrast made in the first Judiciary Act between government actions to exact "penalties and forfeitures" and "suits at common law where the United States sue" (see

pp. 44, 45–47, *supra*). And, today, one can arguably find the line of demarcation in Chapter 85 of the Judicial Code, which distinguishes between "ordinary" cases in which the government is plaintiff (28 U.S.C. 1345) and "special" cases, including those in which the sovereign is invoking its power of eminent domain (28 U.S.C. 1358), collecting its revenue (28 U.S.C. 1340), enforcing postal regulations (28 U.S.C. 1339), or exacting penalties and forfeitures (28 U.S.C. 1355). One obstacle, however, is that, as we have seen, the category of government "suits at common law" in the First Judiciary Act included eminent domain cases—and presumably others of what we have labelled "special cases." So, also, the present scheme of provisions defining the jurisdictions of district courts is little more than historical accident. It is not a safe basis for constitutional adjudication.

There is, moreover, a more fundamental objection to the suggested distinction. On the one side, it can be said that the government is always acting officially and, if legitimately, pursuant to powers conferred by the Constitution. Thus, in our first example, the vehicle, if a mail truck, is owned for that purpose and the recovery against a tortfeasor is authorized as an incident of the postal power, not by virtue of the common law of negligence. And, in the revenue case, it is possible to say that the government is merely suing on a debt, a classical action at common law. Those analytical difficulties lead us to prefer our primary submission—that the character of the parties alone

decides the applicability of the Seventh Amendment.

Besides, the history of the Seventh Amendment, as we have shown, strongly suggests that *all* government litigation is exempted from its strictures. And that conclusion is consistent with the discrete, but otherwise all-inclusive, category of "controversies to which the United States shall be a party" which the Constitution itself establishes." Art. III, sec. 2. We submit that is a boundary which the Seventh Amendment was never intended to cross.

II. THE SEVENTH AMENDMENT DOES NOT CONTROL THESE CASES BECAUSE CONGRESS PERMISSIBLY CONFIDED THEIR RESOLUTION TO AN ADMINISTRATIVE TRIBUNAL

We have argued (perhaps over-argued) that the Seventh Amendment has no application to litigation involving the government, regardless whether the factual determination is legislatively confided to a court or to an administrative agency. But there is an independent ground for decision of these cases, firmly established in the Court's decisions. It is this: that because Congress has permissibly determined that factual disputes arising under the Occupational Safety and Health Act shall be adjudicated by an administrative tribunal, rather than an ordinary court, the Seventh Amendment is irrelevant. The proposition has

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[89] We note also the provisions of chapter 161 of the Judicial Code (28 U.S.C. 2401–2416) which announce special rules when the United States is a party to litigation.

two parts, which we consider in turn: (1) that Congress was constitutionally free to assign to an administrative agency the resolution of these controversies; and (2) that the consequence is that jury trial need not be afforded.

At the outset, however, it may be well to make some preliminary observations. First, we wish to stress that the present argument is in no way inconsistent with our initial submission. On the contrary, the historical analysis of the Seventh Amendment, if correct, *confirms* this Court's consistent course of decisions exempting administrative proceedings from the jury trial requirement. All that we have done is to suggest an additional rationale for those results.

On the other hand, it is important to say that the two arguments are not merely opposite sides of the same coin. The submission we are now advancing is *not* limited to situations in which the government is the protagonist. That circumstance, it is true, is a sure indication that the subject matter is within the area which has been labeled that of "public rights," and we accordingly notice it here. But the character of the parties does not define the area of "public rights," as we use the term. Rather, we argue that congressional discretion to choose an administrative forum for the resolution of factual disputes depends on the fact that the subject matter is one with respect to which the legislature has plenary constitutional power. If that condition is satisfied, it is irrelevant whether the enforcement of such "public rights" is reserved to the government itself or assigned to indi-

viduals adversely affected by the violation of a regulation, or to both. A sufficient example is the workmen's compensation remedy which most States afford to the injured employee in an administrative proceeding, notwithstanding provisions in State constitutions comparable to the Seventh Amendment. See *Mountain Timber Co.* v. *Washington,* 243 U.S. 219, 235.

If, in what follows, we emphasize the public character of the dispute and the government as enforcer, that is only because those are the features of these cases which place them well within the area of congressional discretion to use the administrative process. But we do not mean to imply that other cases would not be subject to the same rule. Precisely what other cases would properly come within the rule, we have no more occasion to explore than did the court below.

A. CONGRESSIONAL DISCRETION TO INVOKE THE ADMINISTRATIVE PROCESS

1. We notice immediately the subject-matter of these cases. The Act in question deals with public rights. It creates no private cause of action in employees, but leaves them to traditional remedies against employers under workmen's compensation or common law. 29 U.S.C. 653(b)(4); see *Byrd* v. *Fieldcrest Mills, Inc.,* 496 F. 2d 1323 (C.A. 4); *Russell* v. *Bartley,* 494 F. 2d 334 (C.A. 6); *Skidmore* v. *Travelers Insurance Co.,* 483 F. 2d 67 (C.A. 5). The Act itself is enforced exclusively by public authorities.

Nor can there be any question that the new legislation responded to an important public concern. As is

repeatedly emphasized in the Committee Reports and debates, "[t]he problem of assuring safe and healthful workplaces * * * ranks in importance with any that engages the national attention today." Leg. Hist. 142. Only comprehensive and uniformly-enforced Federal legislation could reduce the work-related carnage at which the statute was aimed (Leg. Hist. 144):

> Nor has state regulation proven sufficient to the need. No one has seriously disputed that only a relatively few states have modern laws relating to occupational health and safety and have devoted adequate resources to their administration and enforcement. Moreover, in a state-by-state approach, the efforts of the more vigorous states are inevitably undermined by the short-sightedness of others. The inadequacy of anything less than a comprehensive, nationwide approach has been exemplified by experience with the chemical betanaphtylamine—a chemical so toxic that any exposure at all is likely to cause the development of bladder cancer over a period of years. The Commonwealth of Pennsylvania discovered this extreme effect of betanaphthylamine and banned its use, manufacture, storage or handling in that State, but production of this lethal chemical has begun in another State where legislation is inadequate. The exposure of workers to betanaphthylamine continues today.
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> In sum, the chemical and physical hazards which characterize modern industry are not the problem of a single employer, a single industry, nor a single state jurisdiction The spread of industry and the mobility of the workforce combine to make the health and safety of the worker truly a national concern.[90]

And so, Congress, invoking its power to regulate interstate commerce, enacted this law. It is, and must be, conceded (Sixth and Seventh Amendment objections aside) that Congress acted well within constitutional bounds. The only question is whether, in exercising the plenary power granted by Article I, Congress may provide for non-judicial resolution of disputes arising under the new regulations which might, instead, be assigned to traditional courts.

2. The answer begins with *American Insurance Co.* v. *Canter*, 1 Pet. 511, from which "[t]he concept of a legislative court derives." *Glidden Co.* v. *Zdanok, supra,* 370 U.S. at 544. *Canter* involved an inferior court created by the Territorial Legislature of Florida and the question presented was whether such a court, not established under Article III, could exercise admiralty jurisdiction. Chief Justice Marshall answered (1 Pet. at 546):

> It has been contended, that by the constitution the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of this judicial power must be vested "in one supreme court, and in such inferior courts as congress shall from time to time * * * establish." Hence, it has been argued, that congress cannot vest admiralty jurisdiction in courts created by the

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[90] See p. 4, n. 2, *supra*. See also, *e.g.*, Leg. Hist., 142–143, 343, 406, 413–414, 457, 512–513, 845, 854, 865, 991; *Brennan* v. *Review Commission and Gordon Co.*, 492 F. 2d 1027 (C.A. 2).

territorial legislature. We have only to pursue this subject one step further, to perceive that *this provision of the constitution does not apply to it.* The next sentence [of Art. III, sec. 1] declares, that "the judges both of the supreme and inferior court, shall hold their offices during good behavior." The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are incapable of receiving it. *They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by congress, in the execution of those general powers which that body possesses over the territories of the United States.* [Emphasis added.]

While the decision, on its face, is restricted to a territorial situation in which Article III courts did not exist (1 Pet. at 546), it has long been taken as establishing Congressional discretion to place certain disputes cognizable under Article III into Article I forums and make "constitutional limitations on the exercise of judicial power * * * inapplicable," *Glidden Co.* v. *Zdanok,* 370 U.S. at 547, even if those disputes could have been resolved in judicial courts.

See, *e.g., Ex parte Bakelite Corp.,* 279 U.S. 438, 449–453, 456–457; *Crowell* v. *Benson,* 285 U.S. 22, 50–51; *Glidden Co.* v. *Zdanok, supra,* 370 U.S. at 544–552 and nn. 13, 21; *Palmore* v. *United States,* 411 U.S. 389, 400–404.

The further question of the limits on such Congressional Article I discretion was first addressed in *Murray's Lessee* v. *Hoboken Land Company,* 18 How. 272. The Court there held that the Federal Treasury could administratively determine revenue owed by a defaulting tax collector and collect it by levying on the debtor's property without invoking the judicial power. The premise of the ruling is that (18 How. at 284):

> * * *** there are matters, *involving public rights,* which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but *which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.* [Emphasis added.] [91]

To the same effect is *Oceanic Navigation Co.* v. *Stranahan,* 214 U.S. 320, a suit brought by a shipping firm to recover a money penalty exacted by the Secretary of Commerce and Labor pursuant to summary administrative fact-findings under the Immigration

[91] The panel dissent below attempted to distinguish this case on the ground it did not speak to the Seventh Amendment jury-trial issue because the right involved was fiduciary and equitable (Irey Cert. App. 19b–21b). In *Phillips* v. *Commissioner,* 283 U.S. 589, 596, Justice Brandeis, speaking for a unanimous Court,

(Continued)

Act of 1903, which prohibited shippers from importing aliens with diseases or physical defects likely to impair their ability to earn a living. In affirming the administrative imposition of a civil penalty the Court held (214 U.S. at 339):

> In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff, but as to internal revenue, taxation, *and other subjects,* has proceeded on the conception that *it was within the competency of Congress, when legislating as to matters exclusively within its control,* to impose appropriate obligations and sanction their enforcement by reasonable money penalties, *giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.* [Emphasis added.][92]

(Continued)

unequivocally rejected that characterization. In affirming Congress' use of a broader summary process to collect taxes from a tax debtor's transferees, he stated: "It is urged that the decision in the *Murray* case was based on the peculiar [fiduciary] relationship of a collector of revenue to his government. *The underlying principle in that case was not such relation, but the need of the government promptly to secure its revenues.*" [Emphasis added.]

More importantly, *Murray's Lessee* held the government did not have to resort to judicial process at all in the first instance to determine and enforce its plenary public right—a result which makes inquiry into the legal or equitable nature of the proceeding if it were within an Article III forum irrelevant.

[92] Petitioners, following Judge Gibbons' panel dissent (Irey Cert. App. 14b–19b), would distinguish *Oceanic Navigation* and similar cases on the ground they involved not *in personam* proceedings but proceedings *in rem* to which the Seventh Amendment did not apply (Br., n. 22). It is not at all clear those

We next notice *Block* v. *Hirsh*, 256 U.S. 135, where the Court sustained a temporary Federal statute passed under the war power for the emergency purpose of preventing wartime housing profiteering in the nation's capital. The act suspended landlords' legal remedy of ejectment and relegated them to an administrative fact-finding forum charged with determining fair rents at which tenants could hold over despite expiration of their lease. Mr. Justice Holmes, for the majority, flatly rejected contentions that this scheme violated both parties' right to a civil jury trial, noting that while Congressional declarations of compelling public need were not conclusive on the courts (256 U.S. at 155):

> * * * circumstances have clothed the letting of buildings in the District of Columbia *with a*

proceedings were *in rem*, since the government neither seized the vessels in those cases nor executed liens on them, but simply denied the owners clearance papers until administratively-determined penalties were paid. Certainly neither the *Oceanic* Court, nor this Court subsequently, characterized those proceedings as *in rem*. Cf., *e.g.*, *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329; *Helvering* v. *Mitchell*, 303 U.S. 391, quoting and repeatedly citing *Oceanic Navigation* in support of a decision upholding an Article I scheme of administrative penalty-imposition which was clearly *in personam*.

In any event the asserted distinction is untenable. As the *Irey* panel majority concluded—correctly, we submit—"the differences between *in rem* and *in personam* actions are [in]sufficient to distinguish the thrust of such precedents as Oceanic Navigation * * * [where] the Court *refused to accept the proposition that Congress could not authorize the imposition of a penalty and commit its collection to an administrative officer without the necessity of resorting to the judicial power*" (Irey Cert. App. 8b, n. 11; emphasis added). See also Irey Cert. App. 8a.

> *public interest so great* as to justify regulation by law. * * * [W]hat in its immediate aspect may be only a private transaction may * * * be raised by its class or character to a public affair.

He continued (*id.* at 158):

> The statute is objected to on the further ground that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land. *If the power of the Commission established by the statute to regulate the relation is established,* as we think it is, by what we have said, *this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable.* While the act is in force there is little to decide except whether the rent allowed [by the Commission] is reasonable, and upon that question the courts are given the last word. *A part of the exigency is to secure a speedy and summary administration of the law,* and we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision * * *. [Emphasis added.]

In *Ex parte Bakelite Corp.*, 279 U.S. 438, a unanimous Court found the old Court of Customs Appeals to be an Article I legislative court (279 U.S. at 451, 458):

> Legislative courts also may be created as special tribunals to examine and determine various matters, *arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control.* Congress may reserve to

> itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.
>
> * * * * *
>
> The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports * * *. The full province of the court under the act creating it *is that of determining matters arising between the Government and others in the* * * * *administration and application of the customs laws.* * * * The appeals include *nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers.* True, the provisions of the customs laws requiring duties to be paid and turned into the Treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; *but this does not make the matters involved in the protests any the less susceptible of determination by executive officers.* [Emphasis added.] [93]

Of special relevance is *Crowell* v. *Benson,* 285 U.S. 22. There the Court generally sustained an adminis-

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[93] The holding of the plurality and concurring opinions in *Glidden Co.* v. *Zdanok*, 370 U.S. 530, that the successor Court of Customs and Patent Appeals was an Article III court, does not detract from the force of these general observations. Indeed, the *Glidden* result largely rests on the conclusion that *Bakelite* misapplied its general observations, 370 U.S. at 548–552 *passim*, and as such reinforces them.

trative notice, contest and hearing scheme which was procedurally indistinguishable from OSHA's but remitted private rights cognizable in admiralty to a factfinding commission. Mr. Chief Justice Hughes, speaking for an eight-man majority, drew a sharp distinction between public and private rights. 285 U.S. at 50–58 *passim*. "As to determinations of fact," he said (285 U.S. at 50–51):

> the distinction is at once apparent between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. * * * [T]he Congress, in exercising the powers confided to it, may establish "legislative" courts * * * to serve as special tribunals "to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." But "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." * * * Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the [plenary] congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.

> *The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined.* But in cases of that sort, there is no requirement that, *in order to maintain the essential attributes of the judicial power,* all determinations of fact [*even*] *in constitutional courts* shall be made by judges. [Emphasis added.]

Significantly, while the opinion went on generally to sustain administrative fact-finding even in this private-right sphere, it did so on the theory that the commission was an integral and immediate adjunct of Article III courts analogous to juries and masters, not an independent agency. 285 U.S. at 51–54. See Jaffe, *Judicial Control of Administrative Action* 88–89 (Abr. Ed., 1965). Implicit in this analysis is the assumption that where, and only where, exclusively Article III private (rather than Article I plenary public) rights are involved, the judicial institutions inherent in Article III—including a jury trial where mandated, 285 U.S. at 51—must be preserved.

Next in sequence is *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329, where the Court reaffirmed the scheme sustained twenty-three years earlier in *Oceanic Navigation*. In the interim the statutory fines had been increased from $100 to $1000 per diseased immigrant, and the shipper urged that it was constitutionally entitled to trial of the facts *de novo*. The Court flatly rejected this assertion, holding (287 U.S. at 335) that "Congress may choose the administrative rather than the judicial method of imposing [fines]" if it has

"plenary" power in the sphere regulated, the fines authorized are not unreasonable or confiscatory, and due process is afforded (287 U.S. at 335–336):

> the statute imposing the fines must be regarded as an incident to the exercise by Congress of its plenary power to control the admission of aliens, and *due process of law does not require that the courts, rather than administrative officers, be charged, in any case, with determining the facts upon which the imposition of such a fine depends.* * * *
>
> The action of the Secretary is, nevertheless subject to some judicial review * * *. The courts may determine whether his action is within his statutory authority * * * whether there was any evidence before him to support his determination * * * and whether the procedure which he adopted in making it satisfies elementary standards of fairness and reasonableness, essential to the due administration of the summary proceeding which Congress has authorized. [Emphasis added.]

We come, then, to the modern cases. In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, the Court, speaking through Mr. Chief Justice Hughes (the author of *Crowell*), sustained the Board's power to compel reinstatement and payment of back wages by employers without the intervention of a Seventh Amendment jury. The Court rejected the contention that backpay was equivalent to a money judgment, concluding that the Seventh Amendment was inapplicable "where recovery of money damages is an incident to [non-legal] relief even though dam-

ages might have been recovered in an action at law." 301 U.S. at 48–49. That was sufficient to dispose of the contention; but the Court added, in language strikingly reminiscent of the public-right holding in *Block* v. *Hirsh, supra,* that the case was outside the Amendment because this was a "statutory proceeding" (*ibid.*):

> The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. *It is a statutory proceeding.* Reinstatement of the employee and payment for time lost *are requirements* [*administratively*] *imposed for violation of the statute and are remedies appropriate to its enforcement.* The contention under the Seventh Amendment is without merit. [Emphasis added.]

Since the Chief Justice was well aware that the mere statutory status of a claim did not preclude the Amendment's application, having extensively treated the problem of mandatory trial of statutory facts in *Crowell, supra,* he could only have meant that the Board proceeding was created by Congress to regulate *public* rights.

In *Helvering* v. *Mitchell,* 303 U.S. 391, the Court sustained an enforcement scheme identical to OSHA's in both structure and the purely adjudicatory nature of the Article I forum employed. The Commissioner of Internal Revenue served Mitchell with both a notice of tax deficiency exceeding $700,000 and a proposed 50 per cent penalty for tax evasion; Mitchell unsuccessfully contested the notice and penalty by

protest and hearing before the Board of Tax Appeals; and the Court emphatically affirmed this procedure, stating that "the determination of the facts upon which liability is based may be by an administrative agency instead of a jury." 303 U.S. at 399, 402. To be sure, the opinion explicitly deals only with the Sixth Amendment. But it is hardly conceivable that the Seventh Amendment was simply overlooked. The Court had recently held that neither in administrative tax protests prior to collection, nor alternative court suits to recover paid deficiencies, were taxpayers entitled to a jury trial as a matter of constitutional right. *Wickwire* v. *Reinecke*, 275 U.S. 101; *Phillips* v. *Commissioner*, 283 U.S. 589. The reason given was that (*Wickwire, supra*, 275 U.S. at 105–106):

> the right of the petitioner to a jury in such [an alternative] case is not to be found in the Seventh Amendment to the Constitution but merely arises by implication from the [relevant statutory provision authorizing alternate suits] * * *, which has reference to a suit at law. It is within the undoubted power of Congress to provide any reasonable system for the collection of taxes and the recovery of them when illegal, without a jury trial—if only the injunction against the taking of property without due process of law * * * is satisfied. *Murray's Lessee* * * *.

Finally, both *Curtis* v. *Loether*, 415 U.S. 189, and *Pernell* v. *Southall Realty*, 416 U.S. 363, confirm this analysis. *Curtis* was a statutory private action for actual and punitive damages for housing discrimination, which Congress had assigned for trial in the

ordinary district courts. In applying the Seventh Amendment, the Court reaffirmed both its holding in *Jones & Laughlin* and previous rulings that the mere statutory status of a private claim did not preclude the Amendment's application—thereby suggesting that the legislative choice of forum may be critical (415 U.S. at 194–195):

> *Jones & Laughlin* * * * stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme. *Katchen* v. *Landy*, 382 U.S. 323 (1966) * * * is to like effect. * * * These cases uphold congressional power to entrust enforcement of statutory rights to an administrative process * * * free from the strictures of the Seventh Amendment. But when Congress provides for enforcement of statutory rights *in an ordinary civil action* in the district courts, *where there is obviously no functional justification for denying the jury trial right*, a jury trial must be available *if the action involves rights and remedies of the sort typically enforced in an action at law.* [Emphasis added.]

And in *Pernell* the Court reversed a District of Columbia Court of Appeals ruling that Congress could permissibly eliminate civil jury trials from private and traditionally legal ejectment actions it had placed in the District's courts. The basis of this reversal was

that the lower court had misapplied *Block* v. *Hirsh*, *supra* (416 U.S. at 383):

> *Block* v. *Hirsh* merely stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication. See *Curtis* v. *Loether*, 415 U.S., at 194. See also *NLRB* v. *Jones & Laughlin* * * *. We may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency. ***Congress has not seen fit to do so, however, but rather has provided that*** [*such statutory*] ***actions*** * * * ***be brought as ordinary civil actions in the District of Columbia's court of general jurisdiction.*** Where it has done so, and where the action involves rights and remedies recognized at common law, it must preserve to parties their right to a jury trial. *Curtis* v. *Loether, supra, at 195.* [Emphasis added.]

Significantly, both cases involved Congressionally-prescribed modes of enforcing private (rather than public) rights, and both recognized the existence of Congressional discretion, even here, whether or not to provide for "an ordinary civil action in the district courts." *Curtis* v. *Loether, supra,* 415 U.S. at 195; *Pernell* v. *Southall Realty, supra,* 416 U.S. at 383. We do not explore the limits of that proposition in cases involving the liability of one individual to another. But it is plain that all the cases, from *Murray's Lessee* to *Pernell,* concede absolute legislative discretion in matters of public rights, especially those in which the

government is an immediate party. That is enough to resolve the present cases.

B. ABSENCE OF JURY TRIAL IN ADMINISTRATIVE PROCEEDINGS

We noted, at the outset, that there were, in principle, two discrete questions, one as to legislative discretion to invoke the administrative process, the other as to the right to a civil jury when that choice was permissibly made. But, as the decisions just recited make abundantly clear, an affirmative answer to the first question invariably controls the second. It would be merely tiresome to repeat the pertinent language, already quoted, from *Oceanic Navigation Co., Block* v. *Hirsh, Crowell, Jones & Laughlin, Mitchell, Wickwire,* and finally, *Curtis* and *Pernell.* Those decisions, we submit, finally settle the inapplicability of the Seventh Amendment to administrative proceedings.

It remains to notice petitioners' suggestion that they seek a right to trial *de novo* before a jury *after* the completion of the administrative determination. That is, in our view, a wholly impractical plan. If "jury trials would be incompatible with the whole concept of administrative adjudication" (*Curtis, supra,* 415 U.S. at 194; *Pernell, supra,* 416 U.S. at 383)—where the proceeding is swifter and more informal, the tribunal has developed a special expertise, and uniformity of decisions is assured—how can it make sense to compel a full re-trial by jury afterwards? As has been written in this Court, "[t]he concept of a jury * * * reviewing the action of an

administrative body is contrary to settled federal administrative practice." *Cox* v. *United States,* 332 U.S. 442, 453. See also *Yakus* v. *United States,* 321 U.S. 414, 446–448.

It is of course settled that Article III judicial *review* of administrative adjudications does not implicate the Seventh Amendment if Congress' choice of initial forum was proper. All that is constitutionally required at that stage is review of the legal sufficiency of the evidence to support the facts found, not redetermination of those facts. *E.g., Lloyd Sabaudo Societa* v. *Elting, supra; Crowell* v. *Benson, supra,* 285 U.S. at 50–54; *National Labor Relations Board* v. *Jones and Laughlin, supra.* Cf., *e.g., Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. If due process required an opportunity to have a jury reexamine the facts found by an administrative tribunal in civil cases, it would logically follow that the rule of the Seventh Amendment applies to the States by virtue of the Due Process Clause of the Fourteenth Amendment. But that is not the law. See, *e.g., Walker* v. *Sauvinet,* 92 U.S. 90; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.,* 284 U.S. 151, 158; *Melancon* v. *McKeithen,* 345 F. Supp. 1025, 1045 (E.D. La.), affirmed, 409 U.S. 943, 1098. See also *Curtis* v. *Loether,* 415 U.S. at 192, n. 6; cf. *Alexander* v. *Virginia,* 413 U.S. 836.

This is not to say that Congress cannot decide, either by express statutory command or pertinent silence, that a particular adjudicator should afford a jury trial. See, *e.g., Webster* v. *Reid,* 11 How. 437; *Pernell* v.

Southall Realty, supra, 416 U.S. at 365–366, 374–375, 383. Cf. *Glidden Co.* v. *Zdanok, supra,* 370 U.S. at 549–551. But where, as here, Congress' intent is clearly to the contrary and it is regulating public rights within its plenary powers by invoking an administrative forum, the Seventh Amendment does not overrule the legislative decision and require that trial by jury be afforded either during the proceeding or afterwards.

Indeed, during the whole of our history, regulatory fines and penalties have been collected by non-jury procedures, pursuant to comparable legislative decisions. That practice was common during the Colonial period, for both criminal and civil penalties as high as £500. See Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury,* 39 Harv. L. Rev. 917, 927, 928, 930, 937, 946–947, 950, 952–963, 968 (1926).[94] The practice continued. See, *e.g., Murray's Lessee, supra; Allman* v. *United States,* 131 U.S. 31, 35; *Crowell* v. *Benson, supra,* 285 U.S. at 50–51. It is current today.[95] Indeed, a

[94] This article was researched and written to ascertain "the extent to which the Constitution compels Congress to provide jury trial in the enforcement of federal penal laws" (*id.* at 920). While primarily related to the Sixth Amendment right to jury trial, it also bears on the Seventh Amendment, since both criminal and civil proceedings could be brought to try statutory violations without a jury, and the distinction between the two forms of proceedings was then seldom made. See *id.* at 937.

[95] See, *e.g.,* 39 U.S.C. 5206 (Postal Service); 8 U.S.C. 1221(d), 1223(d), 1227(b), 1229, 1253(e), 1281(d), 1284(a), 1285–1287, 1321, 1322(a), 1322(b), 1323(a), 1323(b) (Immigration and Naturalization Service); 12 U.S.C. 1425a(d), 1425b(b) (Federal Home Loan Bank Board); 49 U.S.C. 1678 (Natural Gas Pipeline Safety Act). Cf. 30 U.S.C. 819; *National Independent Coal Operators'*

recent study, endorsed by the Administrative Conference of the United States, tells us that administrative imposition of monetary penalties has always been a feature of our government, consistently upheld by the courts. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies,* in 2 Recommendations and Reports of the Administrative Conference of the United States (July 1, 1970—December 31, 1972) 907–912, 915, 926–929. And, of course, it is now settled that even criminal fines up to at least $500 may be exacted without the intervention of a jury. *Baldwin* v. *New York, supra;* cf. *Muniz* v. *Hoffman,* 422 U.S. 454, 475–477. It would be most remarkable if, at this late date, the Seventh Amendment were followed for two centuries, or to require a civil jury trial where the Sixth Amendment would not interpose a jury if the penalties were criminal.[96] In our submissions, no such disruptive result is mandated.

Assoc. v. *Kleppe, supra,* 423 U.S. at 393 and n. 3 (Coal Mine Health and Safety Act; limited statutory *de novo* determination of propriety of penalty, but apparently not of facts establishing violation).

[96] Apart from instances of failure to abate in accord with previous orders, OSHA penalties are limited to a statutory maximum of $10,000 for willful or repeated violations, and are generally far below that due to the factors specified in 29 U.S.C. 666(i). From July 1, 1975 to April 30, 1976, penalties proposed by the Secretary averaged $617 for serious violations, $409 for repeated and willful violations, and $12 for non-serious violations (Source: Occupational Safety and Health Administration, Data Center, June 1976). See *Olin Construction Co.* v. *Review Commission,* 525 F. 2d 464, 467 (C.A. 2).

Construed to outlaw this
Consistent rule of government

III. THE SEVENTH AMENDMENT DOES NOT CONTROL THESE CASES BECAUSE CONGRESS HAS CONFIDED THEIR RESOLUTION TO AN EQUITABLE TRIBUNAL

We have thus far assumed that, because these cases involve the recovery of monetary penalties, they would be subject to the strictures of the Seventh Amendment, but for the fact that the government is a party, or the circumstance that Congress has assigned the fact-finding function to an administrative agency. There is, however, a wholly independent basis for denying trial by jury here: that to permit the intervention of a jury would dismember the specialized and essentially equitable scheme which Congress has prescribed for the enforcement of the Occupational Safety and Health Act.

1. This submission relies primarily on *Katchen* v. *Landy,* 382 U.S. 323. That decision (382 U.S. at 338–340) qualified the apparently sweeping rule laid down in *Beacon Theatres* v. *Westover, supra,* and *Dairy Queen* v. *Wood, supra,* that "where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances * * * can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' " 369 U.S. at 472–473. And *Katchen* itself has recently been reaffirmed. See *Curtis* v. *Loether, supra,* 415 U.S. at 194–195. The holding is that a bankruptcy court may exercise summary jurisdiction (without a jury) to determine the concededly legal issues of voidable preferences when passing on creditors' claims.

In reaching that result in *Katchen,* the Court repeatedly stressed the "specific statutory scheme" of the Bankruptcy Act, which "contemplat[ed] the prompt trial of a disputed claim without the intervention of a jury" in a forum essentially performing equitable functions. 382 U.S. at 327, 336–339. To require a separate proceeding before a jury on the issue, the Court concluded, would be "to dismember a scheme which Congress has prescribed." 382 U.S. at 339. We submit the same considerations govern here.

2. It is plain Congress created the Review Commission for the overriding equitable purpose of assuring the swift issuance of injunctions directing abatement of work-related hazards threatening employees. The Act's *raison d'etre* is abatement, not penalty assessments, which were included only to promote voluntary abatement by employers prior to inspection.[97] This has been recognized in the decided cases. See, *e.g., Brennan* v. *Winters Battery Mfg. Co., supra,* 531 F. 2d at 321–323; *Brennan* v. *Review Commission and Kesler & Sons Construction Co.,* 513 F. 2d 553 (C.A. 10); *Dunlop* v. *Haybuster Mfg. Co.,* 524 F. 2d 222 (C.A. 8).[98] The central importance of the abatement remedy

[97] See pp. 5–9, *supra.* As the House Committee noted (Leg. Hist. 853, 856), "The philosophy underlying [this reported bill] is not based on the assumption that American industry can be made safe and healthful by simply enacting a Federal law which emphasizes penalties, because even large ones can become mere license fees. * * * *Death and disability prevention is the primary intent of this bill.* Although possible penalties for violations may be an important deterrent, they are only a partial solution." [Emphasis added.]

[98] As the Third Circuit recently held in dismissing on failure-to-exhaust grounds an employer's attempt to block OSHA in-

is indicated, moreover, by the statutory presumption against suspension of abatement once an administrative abatement order issues. 29 U.S.C. 660(a).

The essentially equitable character of proceedings before the Commission is a consequence of the statutory scheme. The Act mandates abatement as part of the very language creating the citation process, but relegates accompanying penalties to an ancillary, subordinate, and largely discretionary role. Cf. 29 U.S.C. 658(a) and 659(a); 29 U.S.C. 666(a)–(d). It recognizes the special status of abatement orders by authorizing severe sanctions for failure to comply and creating a special proceeding by which employers can enlarge abatement periods without contesting the citation or penalty themselves. 29 U.S.C. 659(b) and (c), 666(d). It provides that petitions for appellate review of Commission orders "shall not * * * operate" to stay abatement, and authorizes summary judicial enforcement of abatement orders which have become final and non-reviewable. 29 U.S.C. 660 (a) and (b). It explicitly treats Commission proceedings as analogous to those seeking permanent injunctions, to which tem-

spection in the district court, the exhaustion doctrine "exemplifies judicial recognition of the autonomy of the executive branch, whose dominion the courts will not invade unless the agency has clearly exceeded its jurisdiction. * * * *Prior judicial intervention would * * * disrupt a statutory scheme which is designed to provide swift issuance of abatement orders to protect employees endangered by the conditions of their work.*" *Matter of Restland Memorial Park,* No. 75-2334, decided July 30, 1976, slip. op. 5, n. 14. (Emphasis added.) Cf. *Weinberger* v. *Bentex Pharmaceuticals, Inc.,* 412 U.S. 645, 653.

porary equitable relief through the district courts is a necessary adjunct. 29 U.S.C. 662. And the same emphasis is revealed in the legislative history. As Senator Javits stated in support of his successful floor amendment creating the Review Commission (Leg. Hist. 462):

> It creates a review commission which * * * will have the same type of authority that the Federal Trade Commission exercises: *The power to issue a cease and desist order,* which, if challenged within a given period of time, can be reviewed by the Circuit Court of Appeals. * * * If the Secretary desires to enforce the order through the contempt power, similarly, he can go into court in order to get the Circuit Court * * * to enter an order for the specific purpose, and then that order can be enforced through the contempt powers of the Circuit Court * * *. [Emphasis added.][99]

3. Not only are proceedings under OSHA essentially equitable, but, as the Court found with respect to the Bankruptcy Act, here, too, Congress was very much concerned with expedition—which, of course, precluded plenary jury trials. And, what is more (unlike the bankruptcy situation), there was a deliberate policy of securing uniformity of decisions through a centralized agency—which, again, the intervention of a jury would tend to defeat.

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[99] See also, *e.g.*, Leg. Hist. 149–155, 172–173, 194–196, 297–298, 463, 470, 851–856, 991, 1191–1192. Significantly, in none of these key passages is the Commission's power to assess discretionary penalties treated as different from its power to enjoin violations. Nor, realistically speaking, could it be so separated. See *National Independent Coal Operators' Assoc.* v. *Kleppe*, *supra*, 423 U.S. at 401.

When we examine the legislative history, we discover that, despite intense Congressional concern for an appropriate fact-finder, juries were never even considered. In the Senate the crucial battle relating to the bill's passage was fought over whether the Secretary or an independent commission should be the adjudicator. *E.g.*, Leg. Hist. 155, 193–195, 199–201, 462. The reported Williams bill authorized the Secretary sitting as an administrative court to adjudicate contested citations and penalties subject to substantial-evidence review in the courts of appeals, Leg. Hist. 204, 256–259; the Javits floor amendment proposed an administrative tribunal operating under expedited procedures independent of the Labor Department. Leg. Hist. 381–393, 462–479. In support of his amendment, which was eventually adopted, Leg. Hist. 478–479, Senator Javits and others advanced as critical considerations the speed, predictable uniformity of decision, and greater appearance of fairness such a commission would afford. *E.g.*, Leg. Hist. 392–393, 462–464, 471–472.

The debate in the House was similarly over whether the Secretary or an independent commission should adjudicate violations and penalties. *E.g.*, Leg. Hist. 877–878. The reported Daniels bill provided fact-finding and penalty assessment by the Secretary subject to substantial-evidence review in the district courts, Leg. Hist. 837–838, 854; the Steiger substitute substantially mirrored the Javits amendment, was supported by similar arguments for expedition, fairness, certainty and expertise, and was overwhelmingly

adopted. Leg. Hist. 763, 786, 880, 988–991, 1069–1070, 1091, 1112. Significantly, no bill which was introduced in either house—let alone those reported and passed—proposed to vest fact-finding and penalty assessment in district courts or juries. The sense of the whole Congress was clearly that a centralized expert adjudicator was required.

That Congress rejected juries as fact-finders is unsurprising given its repeated emphasis on the related enforcement goals of speedy final abatement orders, expert determinations, and nationwide uniformity of both obligations and results. Leg. Hist. 144, 194–195, 462–471, 845, 854.[100] Those goals are basically incompatible with the delays and unpredictable *ad hoc* determinations of juries. As this Court has noted with respect to expertise alone, it is a concept "not consistent with the use * * * of a jury as fact-finder." *Curtis* v. *Loether, supra,* 415 U.S. at 194 n. 8, Cf. *Cox* v. *United States, supra,* 333 U.S. at 453.[101] Indeed, the

[100] See *Brennan* v. *Review Commission and Gordon Co.*, 492 F. 2d 1027, 1030 (C.A. 2).

[101] Contrary to petitioners' suggestion (Br., pp. 78–83), expertise does not relate solely to a fact-finder's ability to resolve isolated issues of fact—a proposition which would swallow the concept, since juries can resolve almost any factual issue treated by agencies. The concept more fundamentally relates to consistency of results and a familiarity with the statutory and policy matrix in which particular facts are found and are to be evaluated—considerations this Court has historically relied upon in determining that an agency has primary jurisdiction, see *Boston Marine Terminal* v. *Rederi. Transatlantic*, 400 U.S. 62, 69, and affirming Congress' authority to create such specialized tribunals. *E.g., Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 559–560. See *Brennan* v. *Gilles & Cotting, Inc.*, 504 F. 2d 1255, 1266–1267 (C.A. 4).

Court has invoked these considerations in rejecting even *non-jury* trial *de novo* of administrative determinations in a comparable context. What was said in *Weinberger* v. *Bentex Pharmaceuticals, Inc., supra,* 412 U.S. at 654, has even greater force against a claim of trial *de novo* with a jury:

> Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience and by more flexible procedure.

We conclude that affording jury trials at any stage of OSHA proceedings would "dismember the statutory scheme," *Katchen* v. *Landy, supra,* and is without "functional justification," *Curtis* v. *Loether, supra,* 415 U.S. at 195, whether they are afforded at initial hearing or after administrative proceedings are complete. Given the essentially equitable character of those proceedings, the Seventh Amendment does not require disruption of the careful legislative plan.[102]

[102] Petitioners assert (Br., pp. 83–85 and n. 37) that imposing a jury trial right on OSHA proceedings will not overcrowd district court dockets because more than 90 per cent of civil penalties imposed by agencies subject to *de novo* review are settled before they reach district court. The short answer is OSHA is currently issuing more than 100,000 citations annually, 5 per cent or 5,000 of which are contested—a figure which constitutes fully one-third of the administrative penalty cases reported by Professor Goldschmid for the entire Federal establishment in 1972, and threatens to

CONCLUSION

For the foregoing reasons the decisions below should be affirmed.

Respectfully submitted.

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place a large number of "additional cases in a [district court] system 'already being engulfed by a tidal wave of litigation.'" Goldschmid, *supra*, at 921, n. 41. More importantly, the assertion overlooks the fact that such settlement statistics are powerful evidence the regulatory system is being distorted by district court trials which neither agencies nor regulated parties in general possess sufficient resources to bear. As the Administrative Conference stated with respect to this very settlement statistic in recommending the elimination of *de novo* review (*Recommendation 72-6: Civil Money Penalties as a Sanction* (Adopted December 14, 1792), p. 2): "Settlements are not wrong *per se*, but the quality of the settlement under the present system is a matter of concern. Regulatory needs are sometimes sacrificed for what is collectible. On the other hand, those accused sometimes charge that they are being denied procedural protections and an impartial forum and that they are often forced to acquiesce in unfair settlements because of the lack of a prompt and economical procedure for judicial resolution. Moreover, several agency administrators warn that some of the worst offenders, who will not settle and cannot feasibly be brought to trial, are escaping penalties altogether."

In short, the central concern is not that *de novo* proceedings would further congest court dockets, but that the drain of resources for such never-ending litigation would compromise enforcement. The Act covers nearly 65 million workers and 5 million workplaces. See The President's Report [To The Congress] On Occupational Safety And Health For 1973, pp. 57, 59 (G.P.O., 1975). The Secretary's current inspection force stands at less than 1,300, an increase of almost 1,000 from Fiscal 1972.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-748

FRANK IREY, JR., INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

No. 75-746

ATLAS ROOFING COMPANY, INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-748

FRANK IREY, JR., INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION, AND
JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

No. 75-746

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OCCUPATIONAL SAFETY AND HEALTH
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JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND FIFTH CIRCUITS

PETITIONERS' REPLY BRIEF

INTRODUCTION

The Government offers three arguments to justify affirmance of the judgments below in these cases. First, the Government contends that the Seventh Amendment is not applicable to cases in which the Government is a party. We respond to this contention in Section I of this reply brief, at pp. 1-32 *infra*. Second, the Government contends that Congress may permissibly bypass both Article III and the Seventh Amendment and delegate to an administrative non-jury adjudicator any cases or controversies which fall at least within the scope of Congress' regulatory powers under Article I of the Constitution. We respond to this contention in Section II of our brief at pp. 32-56 *infra*. Finally, the Government contends, relying primarily on this Court's decision in *Katchen v. Landy*, 382 U.S. 323 (1966), that these cases may permissibly be delegated to an administrative non-jury adjudicator because recognition of a jury right in District Court after the administrative process is complete will result in dismembering the statutory scheme. We respond to this contention in Section III of this brief, at pp. 56-70 *infra*.*

*In this brief we shall use the same citation forms for the various appendices previously filed with the Court as we utilized in our initial brief. See Irey Main Br., at 2, n. 1. For the legislative history of the Occupational Safety and Health Act [hereinafter "OSHA" or "the Act"], we shall use the one-volume Committee reprint utilized by the Government in its brief and shall similarly cite this source as "Leg. Hist." See Gov. Br. 4, n. 2. We shall cite Schwartz, *The Bill of Rights: A Documentary History* (1971), as "Schwartz" with the appropriate volume designation. See Gov. Br. 20, n. 11.

I.

THE SEVENTH AMENDMENT APPLIES TO SUITS IN WHICH THE GOVERNMENT IS A PARTY.

A. Introduction

The Government's "primary argument" (Gov. Br. at 17) is

> that the Seventh Amendment was never intended to control government litigation of *any kind, in any forum*.

Id., 17-18 (emphasis in original).

The Government's contention must be placed in the basic context of our Constitution and the Bill of Rights, and particularly Article III and the Seventh Amendment. "For as every schoolboy knows, the Framers 'designed' the Bill of Rights not against 'state power,' but against the power of the Federal Government." *Williams v. Florida*, 399 U.S. 78, 145 (1970) (Stewart, J., concurring and dissenting). Specifically, the Seventh Amendment was added in direct response to the omission of a civil jury provision in Article III of the new Constitution, which in turn created a Federal judicial power capable of acting directly upon the citizens of the State in executing Federal law and enforcing Federal interests in enumerated categories of cases or controversies, including those arising under the Constitution, law and treaties of the United States, those "between a state and citizen of another state," and those "to which the United States shall be a party."[1] In fact, the ninth section of the Federal

[1] As the Government puts it (Gov. Br. at 26):

> What is more, since Article III authorized the establishment of federal trial courts with a very wide civil jurisdiction, there was no escaping the question whether congress should, or should not, be left free to withhold a right to a jury for these cases.[24]

Judiciary Act of 1789, 1 Stat. 73, 76-77, considered simultaneously by the same Congress that passed the Seventh Amendment, gave the newly created district courts,

> exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; (a) saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States.

See Irey Main Br. at 23. As we noted in our initial brief, the attempt of the English Crown to expand the Admiralty jurisdiction as a device for evading common law jury rights in civil penalty and forfeiture actions arising under the Acts of Trade is what made the deprivation of jury rights a focal point of the American Revolution to begin with. Irey Main Br. 25-31. *See also C.J. Hendry v. Moore, supra,* 318 U.S. 133, 141 (1943).[2]

The Seventh Amendment reads (emphasis added):

> *In suits at common law,* where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any

[2] The Government acknowledges this much. *See* Gov. Br. 40-41:

> To be sure, it is familiar history that in the decade before Independence, Americans inveighed against the practice of assessing and enforcing fines and forfeitures through so-called "vice-admiralty" courts without juries. That is sufficiently reflected in public remonstrances from 1765 through 1776.[68] But it does not follow that the Seventh Amendment was a response to that concern.

> court of the United States, than according to the rules of the common law.

In construing this language, this Court, throughout its 200 year history, has repeatedly and at length pronounced as one of the most basic canons of construction, that "[t]he right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted." *Baltimore & Carolina Line v. Redman,* 295 U.S. 654, 657 (1935); *Capital Traction Co. v. Hof,* 174 U.S. 1, 7-8 (1899); *United States v. Wonson,* 1 Gall. 4, 20 (C.C. Mass. 1812). Nor is this canon of construction the product of careless assumption once asserted and repeated automatically down through the years. Rather the principle reflects the considered judgment of one of the Court's greatest scholars closest in time to the Constitution (Justice Story), and is rooted, *inter alia,* in this Court's own review of the "legislative history" of the Constitutional Convention and the time period preceding the Seventh Amendment's enactment. *See Colgove v. Battin,* 413 U.S. 149, 152-56 (1973). And that canon of construction is also rooted in a more general and equally fundamental principle of this Court's constitutional jurisprudence:

> The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention, who submitted it to the ratification of the Convention of the thirteen states, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.

Ex parte Grossman, 267 U.S. 87, 108-09 (1925).

As we have shown in our initial brief, a governmental action for a forfeiture or penalty based on a statutory violation was a classic instance of a "common law" suit under English and contemporary American practice at the time of the adoption of the Seventh Amendment. Irey Main Br. at 32-38. Respecting governmental proceedings for forfeiture of property based on statutory violations, this Court, in *C.J. Hendry v. Moore, supra*, extensively examined the contemporaneous American understanding of the phrase "common law remedy" as used in section nine of the First Judiciary Act and concluded – based on an in-depth canvassing of cases from Virginia, Maryland, Massachusetts, New Jersey, Pennsylvania, New Hampshire, Connecticut, Maine, and New York (318 U.S. 140-48) – that

> In general the suits were brought against the vessel or article to be condemned, were tried by jury, closely followed the procedure in Exchequer, and if successful resulted in judgments of forfeiture or condemnation with a provision for sale.

318 U.S. at 140. *See also id.* at 153 ("In all this we perceive a common understanding of judges, lawyers and text writers, both before and after the adoption of the Constitution, of the common law nature of the procedures and judgment *in rem* in forfeiture cases and of its use in such proceedings in the Exchequer and in the American common law courts").[3] *See also United States v. Wonson*, 1 Gall. at 14 (Irey Main Br. 39-40, n. 21) (federal governmental proceeding for penalty under Federal Statute).

[3] Chief Justice Stone's opinion in the *Moore* case has been described as

> at once a monumental piece of erudition and a notable contribution to the meaning of the much mooted phrase "common law remedy."

Dickinson & Andrews, *A Decade of Admiralty in the Supreme Court of the United States*, 36 Cal. L. Rev. 169, 173 (1948).

Thus, as we asserted in our initial brief, under the traditional criteria for determining the content of the Seventh Amendment phrase "suit at common law," governmental proceedings for penalties or forfeitures were within the very core of the constitutional concept. Irey Main Br. at 72. See generally *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 231 P.2d 832 (1951).[4] *The Government, throughout its 91-page submission never once challenges this assertion.* Rather, the Government now urges this Court to discard its fundamental canon of construction (*see* Gov. Br. at 19-20) and to interpret the phrase "suit at common law" as limited to civil suits in which the Government is not a party.[5] The claimed exemption has no basis in the text of the Seventh Amendment. Moreover, the exemption would contradict the contemporaneous understanding

[4] In *One 1941 Chevrolet Coupe, supra*, the California Supreme Court presents another extensive historical survey of English and American practice in support of its holding that under the California Constitution there is a right to trial by jury in a state proceeding to forfeit a car used to transport narcotics. *See id.* at 286-98, 231 P.2d at 835-43.

[5] As we understand the Government's primary argument, the distinction the Government urges is between civil cases in which the litigants are private as opposed to those cases in which the Government appears as a litigant. Under this theory, presumably other Federal Question cases in Federal Court in which the litigants are private persons *would* be governed by the Seventh Amendment if the remedy sought were money damages in excess of $20. *See, e.g., Curtis v. Loether*, 415 U.S. 189 (1974).

But the Government's statement of its theory on this point is not at all clear. Thus, at pp. 43-44 we are told "[The Seventh Amendment] dealt only with that private litigation where a civil jury had been traditional, which the federal courts might now entertain by virtue of diversity jurisdiction. All other cases, including the new field of litigation involving the federal government, were left to be provided for by legislation." That statement implies a dichotomy identical to the "Article I–plenary-public rights" theory (see pp. 32-56 *infra*), but the Government seems to inform us, in the course of articulating that theory, that the historical argument "is . . . limited to situations in which the government is the protagonist." Gov. Br. at 62.

of the language of the Seventh Amendment as shown by practice in the State and Federal Courts at the time of the Amendment's adoption. Finally, the exemption presupposes a willingness on the part of the States to free the Federal Government of the restraint of a common law jury in the very class of cases where the citizens of the respective states had actually experienced the oppression that results when a remote central governmental power chooses to evade the local lay jury in pursuit of its own substantive governmental interests.

B. The Government's Argument From Historical Evidence

The Government constructs the following argument from "the historical evidence" (Gov. Br. at 20):

> 1. Between 1776 and 1783 six states (Virginia, Pennsylvania, North Carolina, Vermont, Massachusetts, and New Hampshire) adopted constitutional provisions concerning civil jury rights which included a phrase like "between man and man" or a reference to "controversies respecting property" but made no reference to "disputes to which the Government is a party" (Gov. Br. 21-25; quote from p. 23);
>
> 2. Five of these states (Massachusetts, New Hampshire, Pennsylvania, Virginia, and North Carolina) in their proposed civil jury trial amendments to the new Constitution included language like "between man and man" and "controversies respecting property" with no reference to "governmental litigation" (Gov. Br. 27-30; quote from p. 27);
>
> 3. James Madison's original draft of the Seventh Amendment similarly included the phrase "between man and man" and its deletion from the final text should be construed as "stylistic improvement only, not change of substance." (Gov. Br. 30-37; quote from p. 33.)

We deal with each point in turn.

1. *The Interpretation of the Government's Key Phrases in Light of Contemporaneous State Practices* – As we have noted, this Court in *C.J. Hendry v. Moore, supra,* extensively surveyed contemporaneous practices respecting jury trials and common law remedies in State forfeiture actions for statutory violations in Virginia, Maryland, Massachusetts, New Jersey, Pennsylvania, New Hampshire, Connecticut, Maine and New York.[6] *See id.*, 318 U.S. at 140-48. The California Supreme Court, in *People v. One 1941 Chevrolet Coupe,* 37 Cal. 2d at 297-98, n. 18, 231 P.2d at 842, n. 18, summarized the results of that historical survey as follows:

> Footnotes 4, 5, and 6 to the opinion in *C.J. Hendry Co.* v. *Moore*, 318 U.S. 133, 63 S. Ct. 499, 87 L. Ed. 633, contain references to many such cases. In Virginia by 1690 forfeiture cases under the Navigation Acts were tried at common law by a jury. In Maryland forfeiture cases were tried generally in courts of oyer and terminer acting with the jury. In Massachusetts forfeiture cases under the Navigation Acts were regularly tried by the Court of Assistants before juries, apparently in the same manner as other common-law cases. In New Jersey proceedings to condemn forfeited property were tried in the court of common pleas with jury as early as 1679. In Connecticut a cargo of a vessel was condemned by a jury in the county court in 1692. In Maine a vessel was cleared by a jury in 1680. Idem. footnote 4. In New York before 1691 forfeiture cases were tried in the General Quarter Sessions of the Peace with a jury; after 1691 in the Supreme Court of Judicature with a jury. *C.J. Hendry Co. v. Moore,* 318 U.S. 133, 63 S. Ct. 499, 87 L. Ed. 663, 670, and footnotes 5-9.

In the face of the *Moore* Court's historical evidence, it is unquestionable that the American judges, lawyers,

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[6] The only one of the Government's five states not covered in the *Moore* case survey is North Carolina.

and scholars of the relevant time period would have understood the phrase "suit at common law" to include "governmental litigation" (Gov. Br. at 27) or "disputes to which the Government is a party" (*id.*, at 23). Nor does the Government seriously maintain the contrary.[7] Rather, the Government relies on the underscored verbal expressions as illustrated by the Virginia State Constitutional provision (Gov. Br. 22-23, emphasis added):

> That in *controversies respecting property*, and in suits *between man and man*, the ancient trial by Jury is preferable to any other, and ought to be held sacred.

In the Government's view, these underscored phrases signify a dichotomy between suits in which the Government is a litigant and suits in which only private persons are litigants. But no historical evidence is tendered respecting contemporaneous practice in the Virginia courts (or any other state court) to sustain the Government's assertion that its "Government litigant – private litigant" dichotomy is the true meaning of the Eighteenth Century Virginian choice of phrases. Rather, virtually the whole of the Government's position is

[7] We say "seriously" in this sentence in the text, since at various points in its brief the Government offers verbal formulations of its position suggesting that colonial and American lawyers would have viewed an action based on a statute as not a "common law" action. *See* Gov. Br. at 29, n. 31: ("The exclusion of 'federal question' cases probably reflects the view that causes of actions created by written laws were not suits 'at common law,' which, alone, were meant to be embraced."); *id.*, at 58 ("In sum, we contrast 'public law' and 'common law' "). Whatever the Government's meaning in these unsupported assertions (*see also* note 5, *supra*), the Government tenders no "historical evidence" to counter our showing that a civil governmental action based on a violation of a statute and seeking a penalty or forfeiture was a classic "common law" action in England and the American States for jury trial purposes.

pitched squarely on a linguistic inference the Government draws from these phrases:

> This language is obviously chosen to govern *private* litigation. We need hardly belabor the point that the reference to "suits between man and man" is inapt to describe disputes to which the government is a party. Arguably, the category of "controversies respecting property" is more open-ended. The more natural reading, however, is that it encompasses only private actions *in rem*, or *quasi in rem*, as distinguished from personal actions. It is not a formula which easily encompasses actions initiated by the government, certainly not the collection of monetary penalties. But we need not finally construe the words "controversies respecting property" since this clause of the Virginia provision (unlike the description "suits between man and man") was left aside by Madison when he drafted the Seventh Amendment. . . . Gov. Br. 22-23 (emphasis in original).

We find the Government's "natural reading" most unnatural. Thus the word "private" appears nowhere in the Virginia provision, and, in particular, the expression "controversies respecting property" is not limited to "private" as opposed to "governmental" actions. Indeed, the *Moore* case states, respecting Virginia practice:

> [4] VIRGINIA: In the 1670s forfeitures under the Navigation Acts were declared by the Council. See Minutes of the Council and General Court of Colonial Virginia, 1622-1632 and 1670-1676 (ed. McIlwaine, 1924), pp. 212, 214, 216, 242-44, 445-46. But by the 1690s such cases were tried at common law in the General Court before a jury. Although the records of the General Court were destroyed by fire during the evacuation of Richmond in 1865, copies of some of its more important proceedings during the 1690s, contemporaneously transmitted to England, have been

preserved, and are reprinted in Executive Journals of the Council of Colonial Virginia (ed. McIlwaine, 1925), vol. I. See the cases of *The Anne & Catherine*, pp. 173-75; *The William & Mary*, pp. 241-43; *The Content*, pp. 379-80; *Cole v. Three Pipes of Brandy*, pp. 204-05; cf. *The Crane*, pp. 233-34, 300; *The Catherine*, pp. 263-64; *The Society*, pp. 196-97, 219, 235-36, 252-53. See also the cases of *The Elezabeth* and *The Mary & Ellery*, in Edward Randolph, Including His Letters and Official Papers (ed. Toppan, 1899), vol. 5, p. 139; *The Crown*, condemned by a jury at a special court in 1687, 12 Va. Mag. of Hist. & Biog. 189. The Governor exercised a power to commission a special admiralty court in the cases of a prize (*The St. Ignace*, Exec. J., vol. I, pp. 366-67, 368-69), but apparently not for condemnation cases under the Acts of Navigation. An admiralty court, for Virginia and North Carolina, was established in 1698. Id., p. 379; Chitwood, Justice in Colonial Virginia, pp. 71-73.

318 U.S. at 140, n. 4.

Thus in Virginia governmental seizures of property for statutory violations were triable to a jury where the siezure was beyond the admiralty jurisdiction. This was characteristic of most of the colonies; *i.e.*, while most *in rem* actions were admiralty cases, the common law had a limited *in rem* procedure for seizures of property on land defined in the main by the practice in the English Exchequer:

> The common law as it was received in the United States at the time of the adoption of the Constitution did not afford a remedy *in rem* in suits between private persons. Hence the adoption of the saving clause in the Judiciary Act, as this Court has held in cases already cited, did not withdraw from the exclusive jurisdiction of admiralty that class of cases in which private suitors sought to enforce their claims by the seizure of a

> vessel in proceedings *in rem*. But to the generalization that a judgment *in rem* was not a common law remedy there is an important exception. Forfeiture to the Crown of the offending object, because it had been used in violation of law, by a procedure *in rem* was a practice familiar not only to the English admiralty courts but to the court of Exchequer. The Exchequer gave such a remedy for the forfeiture of articles seized on land for the violation of law. And, concurrently with the admiralty, it entertained true proceedings *in rem* for the forfeiture of vessels for violations on navigable waters.[1] Such suits in the Exchequer were begun on information and were against the vessel or article to be condemned. Under the provisions of many statutes the suit might be brought by an informer *qui tam*, who was permitted to share in the proceeds of the forfeited article; the judgment was of forfeiture and the forfeited article was ordered to be sold. This was the established procedure certainly as early as the latter part of the seventeenth century.[2] Proceedings *in rem*, closely paralleling those in the Exchequer, were also entertained by justices of the peace in many forfeiture cases arising under the customs laws (see Hoon, The Organization of the English Customs System, 1696-1786, pp. 277, 280-83), and the Act of 8 Geo. I, c. 18, §16, placed within that jurisdiction the condemnation of vessels up to fifteen tons charged with smuggling.

C.J. Hendry v. Moore, 318 U.S. at 137-38.

Thus, the lawyers of Virginia (and the other states), in drafting their Constitution, faced a need to preserve not merely the common law remedy in *in personam* actions, but also the limited common law remedy in property seizures beyond the admiralty jurisdiction. One way to accomplish this legislative goal is to specify jury rights in "suits between man and man" (common law *in personam* actions) and "controversies respecting

property," (common law *in rem* actions) trusting to the judicial process to draw the line in the latter cases between admiralty and common law *in rem* actions based on then-established practice respecting "the ancient trial by jury."

Another way to accomplish this legislative goal is to spell out expressly the admiralty and martime exemption, as in the nearly identical Massachusetts and New Hampshire provisions:

> In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high-seas, and such as relate to mariners wages, the legislature shall hereafter find it necessary to alter it.

Massachusetts Declaration of Rights of 1780, Art. XV, in 1 Schwartz 342.

A third possible way of expressing the same legislative goal is suggested by Maryland's proposed amendment to the Federal Constitution (Art. 3, 2 Schwartz 732):

> That, in all actions on debts or contracts, [typical *in personam* common law writs] and in all other controversies respecting property, [covering possible common law *in rem* actions], of which the inferior federal courts have jurisdiction, the trial of facts shall be by jury, if required by either party; and that it be expressly declared that the state courts, in such cases, have a concurrent jurisdiction with the federal courts with an appeal from either, only as to matter of law, to the Supreme Federal Court, if the matter in dispute be of the value of ____ dollars.

But the difficulty with this form of specification (and, indeed, any attempt at specific enumeration of

cases by subject matter, party-litigant, or type of writ in a Bill of Rights) is that the chosen language will never be exactly congruent with the fundamental goal of the Constitution-writer; *i.e.*, to preserve the existing jury right based on the historical practice and experience of the people, in light of changes to be anticipated in the regime of law in the future. Thus, the better draftsman's option is the choice of appropriate generic categories as per the Seventh Amendment ("suits at common law") trusting in the wisdom of future lawyers and judges to seek explication of the chosen terminology in light of the historic legal practice and vocabulary of the time. *See Ex Parte Grossman*, 267 U.S. at 108-09.

Moreover, it is in any event unlikely that the lawyers of the Colonial and Revolutionary eras would have intended to express a "government litigant" – "private litigant" dichotomy through verbalisms such as "suits between man and man" and "controversies respecting property." Thus, in the area of penalties for statutory violations, one of the particular modes of procedure well known to lawyers and judges of the day was the *qui tam* action; *i.e.*, an informer's action brought by a "private" person "man to man," as it were, to vindicate the governmental interest. And these *qui tam* actions based on statutory violations applied to *in personam* actions for monetary penalties (*see* 2 Legal Papers of John Adams, at 181 & n. 28 [Z.L. Wroth & H. Zibot, eds. 1965]) and *in rem* forfeiture actions. See *C.J. Hendry v. Moore*, 318 U.S. at 137-38. In fact, the *qui tam* proceeding to enforce the governmental interest in monetary penalty actions was one of the established "common law" jury actions in English practice. *See* Irey Main Br. at 36-37.

In sum, the government's "private litigant – Government litigant" dichotomy fits nowhere in the scheme of common law writs and procedures known to contemporary practitioners.[8] The more natural interpretation of the original intent of the authors of these constitutional provisions expressed in terms of "controversies respecting property" and "suits between man and man" is that they intended to preserve the existing common law jury

[8] The Government seeks "confirmation" of its interpretation of the Virginia Constitutional provision in "the 1776 [Virginia] convention's rejection of Jefferson's more inclusive proposals . . ." Gov. Br. at 23.

Jefferson's proposals (as reproduced in the Schwartz compilation) were presented as part of his draft for the Judiciary power section of the Virginia Constitution. 1 Schwartz 243-246. Immediately preceding the civil jury provision, the Jefferson draft spells out the tenure attributes for judges of all branches of the proposed Virginia Court system (General Court, High Court of Chancery, County Courts and "other inferior jurisdictions.") Then the Jefferson civil jury provision reads:

> All facts in causes, whether of Chancery, Common, Ecclesiastical, or Marine law, shall be tried by a jury upon evidence given viva voce, in open court; but there [sic] witnesses are out of colony or unable to attend through sickness or other invincible necessity, their depositions may be submitted to the credit of the jury.

1 Schwartz 244. That provision is "more inclusive" than the "ancient trial by jury" preserved by the Virginia Bill of Rights for "controversies respecting property" and "suits between man and man" insofar as it covers non-common law courts such as the Chancery (Equity) and admiralty jurisdictions. But there is no historical evidence to suggest that Jefferson (or anyone else in Virginia) viewed the difference between the provisions in terms of the Government's "private litigant–Government litigant" dichotomy.

Jefferson's next provision appears directed at the criminal jury right:

> All Fines and Amercements shall be assessed, & Terms of imprisonment for Contempts & Misdemeanors shall be fixed by the verdict of a jury.

Compare George Mason's original draft (Section 8, 1 Schwartz 242); Virginia Declaration of Rights, Section 8 (*id.*, at 236).

right whenever a man's purse or property is attacked civilly either by the direct route of a personal suit against him or the indirect route of a suit against his property.

2. *The Jury Provisions and Proposals in Other States* – We believe we have shown that the Government's argument from historical evidence fails on its major premise: *i.e.*, the inference based strictly on the wording of six state constitutional provisions and corresponding state proposals to amend the Federal Constitution. However, assuming *arguendo* the Government's linguistic inference were correct, it is instructive to compare the Government's six states with the contemporaneous constitutional provisions of the remaining eight (including Vermont) original states.

Thus, the Constitution of the State of New York (1777) provided (Art. XLI, 1 Schwartz 312):[9]

> XLI. And this convention doth further ordain, determine, and declare, in the name and by the authority of the good people of this State, that trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever. And that no acts of attainder shall be passed by the legislature of this State for crimes, other than those committed before the termination of the present war; and that such acts shall not work a corruption of blood. And further, that the legislature of this State shall, at no time hereafter,

[9] New York's Constitution had no prefatory Bill of Rights. On January 26, 1787, the New York legislature passed "An Act concerning the rights of the citizens of this State" which included the following:

> *Second*, that no citizen of this State shall be taken or imprisoned or be disseized of his or her freehold or liberties of free customs or outlawed or exiled or condemned or otherwise destroyed, but by lawful judgment of his or her peers or by due process of law.

2 Laws of the State of New York, 344-45 (1886).

> institute any new court or courts, but such as shall proceed according to the course of the common law.

Governmental suits for fines and forfeitures were common law actions triable to a jury under this Constitutional provision. *See Vergari v. Marcus*, 26 N.Y.2d 764, 257 N.E.2d 652 (1970); *Colon v. Lisk*, 13 App. Div. 195, 43 N.Y.S. 364, *aff'd* 153 N.Y. 188, 47 N.E. 302 (1897). *See generally C. J. Hendry v. Moore*, 318 U.S. at 141-48. New York's proposed Amendment to the Constitution reads (1 Schwartz 913):

> That the trial by Jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate.

Maryland's constitutional provision respecting civil jury rights reads (Art. XVII, 1 Schwartz 281):

> That the trial of facts where they arise, is one of the greatest securities of the lives, liberties and estates of the people.

Maryland's proposal to the constitutional convention is set forth at p. 14, *supra*. New Jersey's constitutional provision (1776) states (Art. XXII, 1 Schwartz 260):[10]

[10]The Government states that the constitutional provisions of New Jersey and Maryland are "vague generalities." Gov. Br. at 21. We are told New York's and Maryland's proposed amendments are "perhaps ambiguous." Gov. Br. at 28.

These efforts at characterization depend in the first instance on the Government's rejection of this Court's traditional canon of construction for ascertaining the meaning of constitutional provisions framed in the language of the common law in light of the historical experience of the times. *See* p. 5, *supra*. Thus, a jury trial right according to "the Common Law of England" is hardly ambiguous on the "historical evidence" before this Court on the point in issue in this case: *i.e.*, was government litigation presumed excluded?

Moreover, the Government's attempt to avoid the force of the proposed Maryland Amendment to the Constitution turns on the

(continued)

> That the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever.

Delaware's constitutional provision (1776) states (Section 13, 1 Schwartz 278):

> That trial by jury of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people.

South Carolina (1779) had the following provision,[11] Art. XXV (1 Schwartz 332):

(footnote continued from proceeding page)

factually false premise that "cases of revenue" were "probably then supposed to exhaust the category of federal litigation." Gov. Br. at 28, n. 29. *See* the discussion of section nine of the First Judiciary Act at p. 4, *supra*. *See also United States v. Wonson, supra*. Indeed, the express provision in the proposed Maryland civil jury trial amendment exempting revenue cases from the normal restriction on appeals of facts in common law actions (Amend. 4. 2 Schwartz, 733) demonstrates that there could not have been a presumed "government litigant–private litigant" dichotomy in Maryland's case.

[11]That South Carolina provision is particularly interesting as a direct response to the conflict over the expansion of admiralty's jurisdiction to the derogation of common law jury rights in governmental penalty and forfeiture cases.

We do not find in South Carolina's Constitution the typical pattern of parallel provisions addressed to criminal and civil cases. But Article XLI of the South Carolina Constitution reads (1 Schwartz 335):

> That no freeman of this State be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land.

That the jurisdiction of the court of admiralty be confined to maritime causes.

Finally, Georgia's provision (1777) reads (Art. XL, 1 Schwartz 298):

> Art. XL. All causes, of what nature soever, shall be tried in the supreme court, except as hereafter mentioned; which court shall consist of the chief-justice, and three or more of the justices residing in the county. In case of the absence of the chief-justice, the senior justice on the bench shall act as chief-justice, with the clerk of the county, attorney for the State, sheriff, coroner, constable, and the jurors; and in case of the absence of any of the aforementioned officers, the justices to appoint others in their room *pro tempore.* And if any plaintiff or defendant in civil causes shall be dissatisfied with the determination of the jury, then, and in that case, they shall be at liberty, within three days, to enter an appeal from that verdict, and demand a new trial by a special jury, to be nominated as follows, viz: each party, plaintiff and defendant, shall choose six, six more names shall be taken indifferently out of a box provided for that purpose, the whole eighteen to be summoned, and their names to be put together into the box, and the first twelve that are drawn out, being present, shall be the special jury to try the cause, and from which there shall be no appeal.

In none of these six states[12] is there even a shadow of a suggestion that the jury rights the states were seeking to preserve were somehow a function of a "private litigant – Government litigant" dichotomy. The provisions of all of these states, (and, we submit, the provisions of all twelve states) are intended to preserve

[12]Connecticut had no applicable provision. *See* 1 Schwartz 289-90. Rhode Island had no State Constitution until 1842. *Id.* at 95.

the existing jury right as interpreted in light of English and the relevant American Colonial experience. *See Ex Parte Grossman, supra.*

But, most importantly, the extraordinary range of expressions for these states (and, indeed, all the original states) demonstrates the basic correctness of the Court's interpretation in *Colgrove v. Battin, supra,* of the legislative history of the Seventh Amendment as it appears in the Federal Constitution. In the *Colgrove* case, this Court – based on its own survey of the legislative record of the Constitutional Convention and the ratification debates in the State Conventions – drew the following conclusions:

> But the omission of a protective clause from the Constitution was not because an effort was not made to include one. On the contrary, a proposal was made to include a provision in the Constitution to guarantee the right of trial by jury in civil cases but the proposal failed because the States varied widely as to the cases in which civil jury trial was provided, and the proponents of a civil jury guarantee found too difficult the task of fashioning words appropriate to cover the different state practices.[8] The strong pressures for a civil jury provision in the Bill of Rights encountered the same difficulty. Thus, it was agreed that, with no federal practice to draw on and since state practices varied so widely, any compromising language would necessarily have to be general. As a result, although the Seventh Amendment achieved the primary goal of jury trial adherents to incorporate an explicit constitutional protection of the right of trial by jury in civil cases, the right was limited in general words to "suits at common law."[9] We can only conclude, therefore, that by referring to the "common law," the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury.[10]

413 U.S. at 153-56. If the Government's linguistic inference were acceptable as a mode of interpreting the relevant constitutional language of the six states the Government relies on, this Court would then be faced with the precise disuniformity in state practice and in state proposals for constitutional amendments which necessitated a uniform federal standard based principally on contemporaneous English Common Law practice in construing the Seventh Amendment.

3. *James Madison's First Draft of the Seventh Amendment* – Perhaps the most glaring flaw in the Government's argument from historical evidence is the treatment accorded James Madison's initial draft of the Seventh Amendment, which read (2 Schwartz 1028):

> In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

The "between man and man" phrase – which forms the lynchpin of the Government's entire historical evidence argument – was deleted in Committee, and the Amendment came to the Floor of the House in the following form (2 Schwartz 1117):

> In suits at common law, the right of trial by jury shall be preserved. . . .

The Government explains (Gov. Br. at 33):

> When we compare this provision with Madison's draft, it is obvious the committee was condensing and sharpening language. The florid phrase "as one of the best securities to the rights of the people" is deleted as surplusage. And the shorter and more direct mandate "shall be preserved" is substituted for "ought to remain inviolate." We suggest the omission of the words "between man and man" served a like purpose: stylistic improvement only, not change of substance.

But the Government's whole historical evidence argument is built on a linguistic inference based entirely on the supposedly unambiguous meaning of the verbalism "between man and man" (Gov. Br. at 22-23, emphasis in original):

> This language is obviously chosen to govern *private* litigation. We need hardly belabor the point that the reference to "suits between man and man" is inapt to describe disputes to which the government is a party. . . .

Indeed, we are cautioned by the Government that the meaning of this verbalism is so inescapably plain that a decent respect for the professional qualifications of the Virginians who drafted the state Declaration of Rights (Mason, Madison, and others) forbids our assuming the *inclusion* of the phrase in the Virginia State provision was "inadvertant" (Gov. Br. 23):

> In sum, the civil jury provision in the Virginia Declaration, on its face, is one limited to private litigation. Considering the distinguished members of the Committee responsible for its drafting, this cannot be supposed to be inadvertant. . . .

But somehow, when we arrive at the critical step in the adoption of the Federal Constitutional provision, the deletion of this same magic phrase, so plain in meaning and significant in substantive content, by the same highly qualified lawyer, is transmogrified into a matter of:

> stylistic improvement only, not change of substance.

Gov. Br. at 33. The severity of the Government's problem here becomes compounded when the Government tries to explain itself on the point.

First, we are referred to Professor Schwartz's statement: "[t]hese changes scarcely alter the fact that the Committee version was a virtual restatement of the

amendments proposed by Madison." Gov. Br. at 34 *citing* 2 Schwartz 1050. But nowhere does Professor Schwartz adopt the Government's interpretation of the "between man and man phrase" in the original draft as supporting an inference that Madison intended to limit the civil jury right to cases brought by non-governmental litigants.[13]

Second, we are told that "[c]ertainly, with respect to the provision that became the Seventh Amendment, the committee had no reason to go further, since, as we have seen, no state had proposed a broader civil jury trial provision." (Gov. Br. at 34). That statement, we think, is not correct. *See* the discussion of the New York and Maryland proposals at p. 18 and note 10.

[13]We note that prior to Madison's first civil jury proposal, his draft included the following (2 Schwartz 1027):

> Sixthly, that in article 3d, section 2, [of the original Constitution] be annexed to the end of clause 2d, these words, to wit:
>
> But no appeal to such court shall be allowed where the value in controversy shall not amount to ____ dollars: nor shall any fact triable by jury, according to the course of the common law, be otherwise re-examinable than may consist with the principles of common law.

His civil jury right draft appeared in the following paragraph (1 Schwartz 1028):

> In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

Under Madison's original format, it would appear that the intent was to protect the right generally to trial by jury according to the course of the common law, and the "between man and man" phrase was simply a way of distinguishing civil from criminal litigations. *Cf. Capital Traction Co. v. Hof, supra*, 174 U.S. at 16 ("By the common law, justices of the peace had some criminal jurisdiction, but no jurisdiction whatever of suits between man and man . . .").

Third, we are told:

> Moreover, to the extent that State practices differed, or that some jury trial proposals were more encompassing than others, the normal course of political compromise suggests that Congressmen would have settled on the narrow common ground. This, of course, was all the more appropriate in writing a *constitutional* rule – which could always be expanded by subsequent legislation.
>
> Our conclusion is confirmed when we look at the membership of the select committee. Many were declared Federalists,[51] and all but one of the others[52] were supporters of the unamended Constitution.[53] And, even if any member had sought to widen the scope of the proposed amendments, it is sure that the committee as a whole, under the influence of Chairman Vining, Madison and Sherman – its only prominent men – would have rejected such an effort. . . .

Gov. Br. at 34-35.

Initially, we note that James Madison on the floor of the House rejected the notion that the rationale for the Federal Bill of Rights could in any way be limited by a "common ground" of the respective State Bills or Declarations of Rights (2 Schwartz 1031):

> It may be said, indeed it has been said, that a bill of rights is not necessary, because the establishment of this Government has not repealed those declarations of rights which are added to the several State constitutions; that those rights of the people, which had been established by the most solemn act, could not be annihilated by a subsequent act of that people, who meant, and declared at the head of the instrument, that they ordained and established a new system, for the express purpose of securing to themselves and posterity the liberties they had gained by an arduous conflict.

> I admit the force of this observation, but I do not look upon it to be conclusive. In the first place, it is too uncertain ground to leave this provision upon, if a provision is at all necessary to secure rights so important as many of those I have mentioned are conceived to be, by the public in general, as well as those in particular who opposed the adoption of this constitution. Besides, some States have no bills of rights, there are others provided with very defective ones, and there are others whose bills of rights are not only defective, but absolutely improper; instead of securing some in the full extent which republican principles would require, they limit them too much to agree with the common ideas of liberty.

More importantly, this final argument in support of the Government's "historical evidence" case reduces to the proposition that this Court should read the Bill of Rights generally as narrowly as possible because the Federalist political party was (in the Government's interpretation of the Federalist political motivation) anti-Bill of Rights. It is important to recognize that there is no principled basis (in terms of this Federalist political motivation argument) for differentiating the Seventh Amendment from the rest of the Bill of Rights.[14]

In *Boyd v. United States*, 116 U.S. 616 (1885), this Court responded to the Government's argument that

[14]Thus the Government observes at another point (Gov. Br. 27) respecting the debates at the Constitutional Convention over amending Article III to include a civil jury right that the "prevailing mood of the delegates [is shown by the fact that] every State without exception reject[ed] a civil jury trial Amendment to Article III." But the States also unanimously rejected Colonel Mason's motion for a committee to prepare *any* Bill of Rights for the Constitution. 2 M. Farrand, Records of the Federal Convention, 587-88 (1911).

the penalty and forfeiture statute there under consideration should be exempted from the Fifth Amendment and Fourth Amendment as not within the literal terms of those provisions:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviation from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. . . .

Id. at 635.

That canon of construction recognizes that the Bill of Rights is "aimed predominantly at restraining the Government as an instrument of the popular will." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 404 (1971) (Harlan J. concurring). Such a restraint depends ultimately on the spirit of interpretation which this Court (and the independent Federal Judiciary generally) applies to these "vague generalities." (*Cf.* Gov. Br. at 21). But James Madison said it best in explaining the Bill of Rights to the House (1 Schwartz 1031):

> It has been said, that it is unnecessary to load the constitution with this provision, because it was not found effectual in the constitution of the particular States. It is true, there are a few particular States in which some of the most valuable articles have not, at one time or other, been violated; but

> it does not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally lead to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights. . .

When all is said and done, we doubt that the Government has been able to explain away the deletion of the critical verbalism on whose alleged plain meaning the Government ha pitched its novel claim. *Cf. Apodaca v. Oregon*, 406 U.S. 404, 410 (1972) ("Surely one fact that is absolutely clear from this history is that after a proposal had been made to specify precisely which of the common-law requisites of the jury were to be preserved by the Constitution, the Framers explicitly rejected the proposal and instead left such specification to the future.").

In fact, if the Government's critical verbalism were thought to have the meaning the Government ascribes to it, the deletion of this phrase would have to cut strongly against the Government's position in these cases. This would be especially so in the case of the draftsman for the Federal Bill of Rights, since one of the principal arguments being made against any Bill of Rights was that a failure to enumerate a particular right would be taken as an abolition of that right. As Madison explained on the floor of the House in presenting his original draft (2 Schwartz 1031):

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the Fourth Resolution.

The clause in Madison's original draft that he referred to here reads (2 Schwartz 1027):

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

It is unlikely that this lawyer would have stricken a phrase thought to carry a "plain meaning" limitation on a general class described by the legislative language as within the protected zone of rights, on an assumption that future courts or lawyers would treat the deletion as stylistic. Nor do we think persuasive the Government's explanation that "the committee completed its work very rapidly, in a single week" (Gov. Br. at 33, footnote omitted).

C. The First Judiciary Act

Finally, the Government challenges our reliance on the provision for jury trial in section nine of the First Judiciary Act for "all suits for penalties and forfeitures incurred, under the laws of the United States. . . ." *See* Irey Main Br. 22-25; Gov. Br. at 44-50.

But the Government's discussion of the First Judiciary Act appears only to confirm the canon of construction respecting that Act's relationship to the Seventh Amendment repeatedly enunciated by this Court – *i.e.*, that the Judiciary Act must be taken as important evidence of its true meaning. *See* the cases cited at Irey Main Br. 22; *see generally Myers v. United States*, 272 U.S. 52, 174-75 (1926).

Thus, the Government's primary argument in this Court is not that penalty and forfeiture cases are somehow to be distinguished from among the general run of government litigation, but rather that all suits in which the government is a party would have been presumed – on the basis of the linguistic inference of the deleted "man and man" phrase – to be outside the category of "suits at common law" within the meaning of the Seventh Amendment. That argument, we submit, cannot stand – as an explanation of the linguistic frames of reference which governed the authors of both the Seventh Amendment and the Judiciary Act[15] – in the face of the inclusion within section nine of the Judiciary Act of "all suits at common law where the United States sues. . . ."

The Government attempts to deal with this considerable embarrasment to its theory by citing this Court's decision in 1876 in *Kohl v. United States*, 91 U.S. 367, which states that eminent domain proceedings could be considered "suits at commcn law" under the jurisdictional provision in Section 11 of the Act which encompasses "all suits of a civil nature at common law or in equity. . ." But our point is not that every time the phrase "suits at common law" appears in the Judiciary Act, it follows that the Constitution requires a jury. Rather, our contention is that with respect to the

[15]On the relationship between the Bill of Rights and the First Judiciary Act, *see* Warren, "*New Light on the History of the Federal Judiciary Act of 1787*," 37 Harv. L. Rev. 49 (1923).

substantive categories of cases understood on the basis of contemporary jury practices to be preserved by the general category "suits at common law," the actions of the authors of the First Judiciary Act in setting the parameters of the jury right must have taken as significant historical evidence. Where contemporary English and American practice clearly demonstrated there would be no jury trial for a given category of cases, presumably the authors of both the Seventh Amendment and the First Judiciary Act would anticipate that construction of these enactments,[16] and would not intend a jurisdictional provision, standing alone, to be dispositive.[17]

Finally, with respect to the Judiciary Act's expansion of federal jurisdiction beyond admiralty to encompass "all seizures on land" (ninth section, Judiciary Act) see Mr. Smith's comments on the floor of the House at 1 Annals of Cong. 828-30, and particularly his observation at 1 Annals of Cong. 829 that (emphasis added):

[16]It is interesting to note the reference to contemporary jurisdictional practices in the Court of Exchequer in England during the course of the debates regarding the First Judiciary Act. 1 Annals of Cong. 846.

We do not find at 1 Annals of Cong. 808, the passage apparently referred to by the Government at Gov. Br. 46, n. 77. Nor do we think the discussion at 1 Annals of Cong. 838-39, wherein it was apparently being maintained incorrectly that state courts could not constitutionally be given power to decide federal questions based on Federal Statutes, offers the Government much support.

[17]Thus the exemption of eminent domain suits from the Seventh Amendment category of "suits at common law" has been rested by this Court on

> the practice in this country and in England to ascertain by commissioners, special tribunals, and other like agencies, the compensation to be made to owners of private property taken for public use, and it was not to be supposed that the general provision in American Constitutions, national and state, preserving the right of trial by jury, superseded that practice.

Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 245 (1897).

There can be no reason why our constituents should be displeased with the arrangement; the district judge will be elected from among the citizens of the State where he is to exercise his functions, and will feel every inducement to promote the happiness and protect the liberties of his fellow-citizens. He will be more independent than the State judges, holding his commission during good behavior, and not influenced by the fear of a diminution of his salary. *Trial by jury will be secured in all cases wherein it is provided in the State courts.* Should the district judge be under any bias, it is reasonable to suppose it would be rather in favor of his fellow-citizens, than in favor of foreigners, or the United States. . . .

II.

AN OSHA NON-JURY ADMINISTRATIVE PENALTY ADJUDICATION IS NOT SUSTAINABLE UNDER THE GOVERNMENT'S "ARTICLE I PLENARY POWER PUBLIC RIGHTS" THEORY.

A. The Government's "Public Rights" Theory Inescapably Encompasses the Federal Judiciary's Entire Article III Federal Question Jurisdiction, Both as a Matter of Original and Appellate Jurisdiction.

The Government contends that under Article III and the Seventh Amendment Congress is free to assign a "controversy" (Gov. Br. at 62) to "an administrative forum for the resolution of factual disputes" (*id.*) without jury participation at any stage as long as

> the subject matter is one with respect to which the legislature has plenary constitutional power.

(*Id.*) This "plenary constitutional power" concept is in turn defined by the Government as encompassing any area of regulatory power delegated to the Congress under Article I of the Constitution (*id.*).[18] And this theory cannot – as the Government acknowledges – be limited to circumstances where Congress chooses a government agency, rather than a private individual, to enforce its "plenary" regulatory power. *Id.* at 62-63.

Thus the Government's "plenary power" test for the permissible limits of congressional discretion to delegate a case or controversy to a non-jury administrative adjudicator necessarily reaches, *inter alia,*

> all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . .

to which Article III, Section 2 extends the judicial power of the United States.

Moreover, at least within the Federal Question category of cases, the "plenary power" test necessarily embraces the whole of the Federal Judiciary's "appellate jurisdiction both as to Law and Fact," to which Article III of the Constitution extends the Judicial Power "with such Exceptions, and under such Regulations as the Congress shall make." *Id.* Thus, it cannot be contended that there is an independent due process right under the Fifth Amendment to appellate review by an Article III federal court at least as to questions of "law" posed on an administrative record (as opposed to "factual disputes"). *See Palmore v. United States,* 411 U.S. 389, 410 (1973).

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[18]The Occupational Safety and Health Act rests only on Congress' power to regulate interstate commerce under Article I, Section 8. *See* OSHA §2(b), 29 U.S.C. §651. Hence the inescapable breadth of the Government's "plenary power" theory.

This "plenary power test"[19] – even within its acknowledged minimal analytical contours – entails so deep an erosion of the fundamental Article III federal judicial check on abuses of Congressional and/or Executive Power as to warrant the closest scrutiny of the precedents and authorities advanced by the Government in support of the theory. Yet a reading of those precedents reveals that, for the most part, the authorities cited by the Government affirmatively compel rejection of the "Article I – plenary power – public rights" argument for bypassing Article III and the Seventh Amendment when Congress tries to go beyond those special subject matter areas where Article I (or some Constitutional doctrine) effectively gives the legislative branch of the nation's Government exclusive and complete regulatory power. Specifically, this Court has never sustained a congressional delegation of Article III cases or controversies to a non-Article III tribunal where the congressional regulatory power rested only on the commerce clause.

B. This Court's Cases Defining the "Plenary Power" and "Public Rights" Concepts Expressly Limit Those Doctrines to Subject Matter Areas Where Congress Has Exclusive and Complete Regulatory Authority.

1. Introduction

The Government extracts its "Article I – plenary power – public rights" theory from three sources: (a) cases defining Congress' regulatory power predominantly in the subject matter areas of taxation and admission

[19]In the ensuing discussion, we shall at times use the shorthand "Article I–plenary power–public rights" to state our understanding of the Government's theory.

of aliens; (b) cases defining Congress' regulatory power over "legislative courts" predominantly in the territories and the District of Columbia; and (c) this Court's decision in *Crowell v. Benson*, 285 U.S. 22 (1932).

2. The Taxation and Alien Immigration Cases

The Government derives its "public rights" concept initially from the sentence in which this phrase is used in the following paragraph of the decision of this Court in *Murray's Lessee v. Hoboken Land Co.*, 59 U.S. (18 How.) 272, 284 (1856):

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power, a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of Congress whether a remedy in the courts shall be allowed at all, in such cases they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases, that upon their trial, the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title.

Foley v. Harrison, 15 How. 433; *Burgess v. Gray*, 16 How. 48.

See Gov. Br. at 67. In this passage, the *Murray* Court did not simply launch a slogan to wreak what havoc it might on the scheme of the Constitution some one hundred and twenty years later. Rather, the Court, in order "[t]o avoid misconstruction upon so grave a subject . . .", spelled out in the terminology common to both Article III and the Seventh Amendment (*i.e.*, "suit[s] at the common law, or in equity, or admiralty;" *cf. Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 436 (1830)) the limits as well as the reach of the "public rights" concept. Thus, Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law," the precise category covering governmental proceedings either against the person or thing, for penalties or forfeitures. *See* pp. 6-7, *supra*. Moreover, to make absolutely certain the opinion would not be misconstrued on so grave a matter, the *Murray* Court, in the same definitional paragraph, tenders a discussion of the Court's cases dealing with titles to land ceded by the government as illustrative of the "public rights" category, in which "it depends upon the will of Congress whether a remedy in the courts shall be allowed at all . . . ."[20]

The entire content of the *Murray* opinion underlines this construction of the "public rights" phrase as used in *Murray*. Thus, the facts in *Murray* involved summary seizure by distress warrant of the property of a Customs Collector in default in his accounts to the Treasury. The congressional statute authorizing sum-

[20] *See also Foley v. Harrison*, 56 U.S. (15 How.) 433, 448 (1853); *Burgess v. Gray*, 57 U.S. (16 How.) 48, 65 (1853).

mary collection was challenged on both Article III and Fifth Amendment due process grounds. The Court treated the two constitutional objections together as raising

> the questions, whether, under the Constitution of the United States, a Collector of the Customs, from whom a balance of account has been found to be due by accounting officers of the Treasury, designated for that purpose by law, can be deprived of his liberty or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so, then, second, whether the warrant in question was such due process of law.

Id., 59 U.S. (18 How.) at 275-76. To justify its conclusion that summary tax process may be "due process," even while bypassing the courts altogether, the Court presented an extended historical analysis of American and English practice respecting tax collection procedures, including the following:

> It is true that in England all these proceedings were had in what is denominated the Court of Exchequer, in which Lord Coke says, 4 Inst. 115, the barons are the sovereign auditors of the kingdom. *But the barons exercise in person no judicial power in auditing accounts, and it is necessary to remember that the exchequer includes two distinct organizations, one of which has charge of the revenues of the Crown, and the other has long been in fact, and now is, for all purposes, one of the judicial courts of the kingdom, whose proceedings are and have been as distinct in most respects, from those of the revenue side of the exchequer, as the proceedings of the Circuit Court of this district are from those of the Treasury;* and it would be an unwarrantable assumption to

> conclude that, because the accounts of receivers of revenue were settled in what was denominated the Court of Exchequer, they were judicial controversies between the King and his subjects, *according to the ordinary course of the common law or equity. The fact, as we have already seen, was otherwise.*

Id., 59 U.S. (18 How.) at 281-82 (emphasis added).

It was precisely on the "judicial" side of the Court of Exchequer where a civil governmental suit for a monetary penalty for violation of a statute would have been brought, strictly as a common law action with a right to trial by jury. *See generally* Irey Main Br. 36-37; *Damsky v. Zavatt*, 289 F.2d 46, 49-50 (2d Cir. 1961). Summary process for collection of taxes due fell on the "revenue side of the exchequer" – whose "functioning has been likened to that of 'an administrative tribunal.'" *Damsky v. Zavatt, supra*, 289 F.2d at 49 *quoting from* 1 F. Pollock & F. Maitland, *The History of English Law*, 192 (2d ed. 1889).

The category of "public rights" then, as carefully delineated by the Court in *Murray*, in essence encompassed those subject matters as to which Congress' regulatory power was so complete that availability of virtually *any* judicial remedy was dependent in the first instance on the Congress' consent to allow any suit at all. *Id.*, 59 U.S. (18 How.) at 284. That delineation of the "public rights" concept as the analytical "line" setting the limits of Congressional power to bypass Article III and the Seventh Amendment meshes with this Court's rationale for holding that suits to enforce claims against the Sovereign are not in the nature of common law suits for Seventh Amendment purposes. *See McElrath v. United States*, 102 U.S. 426, 439-40 (1880). *See also* Irey Main Br. 52-53.

And the same understanding of this "public rights" limitation on the subject matters with respect to which

Congress may totally bypass the judicial power is emphasized in practically every line of the Court's opinion in *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339-40 (1909). Indeed, the *Oceanic* Court, in its analysis of Congress' unique "plenary" power in these subject matter areas, expressly refers to the difference between these powers and the regulatory power Congress exercises when it acts exclusively under the Interstate Commerce Clause (214 U.S. at 334, emphasis added):

> Resting, as the statute does, *upon the authority of Congress over foreign commerce* and its right to control the coming in of aliens into the United States, and *to regulate that subject in the fullest degree*, reserving for future consideration the particular contentions advanced at bar by the plaintiff in error, it may not be doubted that it is not open to discussion that the statute, as thus construed, was within the power of Congress to enact. In Buttfield v. Stranahan, 192 U.S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349, considering the subject, it was said (pp. 492, 493):
>
> "*Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries*; not alone directly, by the enactment of embargo statutes, but indirectly, as a necessary result of provisions contained in tariff legislation. It has also, in other tariff legislation, exerted a police power over foreign commerce by provisions which, in and of themselves, amounted to the assertion of the right to exclude merchandise at discretion."
>
> . . . .

The *Murray* and *Oceanic* cases together, then, carefully limit the "public rights" and "plenary power"

concepts – as to those concepts relate to Article III and the Seventh Amendment – to those subject matters where Congressional regulatory power is complete and exclusive. That same limitation is repeatedly expressed in all the other immigration and tax cases cited by the Government in support of its theory. *See Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 334 (1932);[21] *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938); *Wickwire v. Reinecke*, 275 U.S. 101, 105-06 (1927) *citing, inter alia, Nicholls v. United States*, 74 U.S. (7 Wall.) 122, 127 (1869) and *Cheatham v. United States*, 92 U.S. 85, 88-89 (1876). *See also Phillips v. Commissioner*, 283 U.S. 589, 595 & n. 5 (1931).[22]

This Court's more recent cases amply demonstrate that special rules of constitutional jurispurdence operate in the areas of Congressional power over aliens and taxation. *See Kleindienst v. Mandel*, 408 U.S. 753, 765-66 (1972), (*citing, inter alia, Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)); *U.S. v. Ortiz*, 43 U.S.L.W. 5026, 5032 (June 30, 1975); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *id.*, 413 U.S. at 279 (Powell, J., concurring); *Lynch v. Household Finance Corp.* 405 U.S. 538, 542-43, n. 6 (1972). *See also Perez v. Ledesma*, 401 U.S. 82, 126-27 (1971) (Brennan, J., concurring), and particularly Justice Brennan's treatment at footnote 17 of *Phillips v. Commissioner, supra.*

[21] The *Sabaudo* case also expresses the collateral development of a Fifth Amendment due process check on Congressional powers even within these zones of extraordinary plenary power. *See id.*, 287 U.S. at 335-36 limiting language seemingly to the contrary in the *Oceanic* case, *supra*, 214 U.S. at 342. *See also Phillips v. Commissioner*, 283 U.S. 589 (1931).

[22] In *Phillips v. Commissioner*, 283 U.S. 589, 595 & note 5 (1931) the Court relied, *inter alia*, on *Cheatham v. United States*, 42 U.S. 85, 89 (1876) and "the ancient English practice of summary seizure of the property of a crown debtor" (*see* 283 U.S. 595, n. 5) to support its view that "the right of the United States to collet its internal revenue by summary administrative proceedings has long been settled." Also in *Phillips*, the Court rested the *Murray* rationale squarely on "the need of the government promptly to secure its revenues." *Id.*, 283 U.S. at 596.

In sum, this Court has consistently taken extraordinary care to spell out the limitations as well as the reach of the "public rights" and "plenary power" phrases as they occur in the context of Congressional regulatory power in these unique areas. For the Government now to urge that these cases be treated as a basis for a "plenary power – public rights" equation necessarily encompassing the whole of the Congressional regulatory power under Article I of the Constitution is to urge upon this Court the precise "misconstruction upon so grave a subject" that the Court in *Murray* cautioned against.

3. The "Legislative Court" Cases

Much the same point can be made respecting the Government's use of the "legislative court" line of cases in support of its "Article I – plenary power – public rights" theory. In these cases, this Court has articulated two relevant separate principles, each in turn expressly confined to the special circumstances of Congressional power under the Constitution which call the principles into play. Within the confines of certain geographic areas over which the Constitution accords Congress "plenary" regulatory powers similar to those of state government, the Congress may create non-Article III tribunals and bestow upon them the power to decide all Article III "cases or controversies" [the "Territorial Plenary Power Principle"]. Beyond those geographic zones, Congress' power to bypass Article III tribunals is confined strictly to those subject matters over which Congress has complete and exclusive regulatory power [the "Subject Matter Plenary Power Principle"].

a. *The Territorial Plenary Power Principle* – Thus, in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (Marshall, J.), the Court, in the course of holding that Congress may vest admiralty jurisdiction in a territorial court not conforming to the requirements of Article III, explicitly relies on the special nature of Congress' regulatory powers respecting the territories, *and explicitly rejects extension of that Congressional power to non-Article III tribunals in the states* (emphasis added):

> *Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the 3d article of the Constitution, the same limitation does not extend to the territories.* In legislating for them, Congress exercises the combined powers of the general and of a State government.

And since *Canter*, this Court has carefully tied the special powers of Congress over legislative courts in the territories and the District of Columbia to the unique powers of general sovereignty which the Constitution accords the Congress in these geographical areas.[23] Thus, in *McAllister v. United States*, 141 U.S. 175, 187-88 (1891), the Court, in rejecting the claim of a District Judge for the territory of Alaska that he could not be removed from office during his appointed term, observed (emphasis added):

> The absence from the Constitution of such guaranties [of Article III judicial independence]

[23]The Constitution gives Congress the power

> "to exercise exclusive Legislation in all Cases whatsoever, over [the District of Columbia]. . . ."

Art. I, Sec. 8, Clause 17. Similarly, Article IV, Section 3 provides as follows:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."

> for territorial judges was *no doubt due to the fact that the organization of governments for the Territories was but temporary, and would be superseded when the Territories became States of the Union. The whole subject of the organization of territoral courts, the tenure by which the judges of such courts shall hold their offices, the salary they receive, and the manner in which they may be removed or suspended from office, was left by the Constitution, with Congress under its plenary power over the Territories of the United States.* How far the exercise of that power is restrained by the essential principles upon which our system of government rests, and which are embodied in the Constitution, we need not stop to inquire; though we may repeat what was said in *Late Corporation of Church of Christ of Latter Day Saints v. United States*, 136 U.S. 1, 44 [34: 481, 491]: "Doubtless Congress, in legislating for the Territories, *would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments;* but these limitations would exist rather by inference, and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."

In fact, one of those very constitutional limitations "in favor of personal rights which are formulated in the Constitution and its Amendments" which has been applied even within these unique territorial zones of "plenary power" is the Seventh Amendment. *See Pernell v. Southall Realty*, 416 U.S. 363 (1974) (District of Columbia); *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899) (District of Columbia); *Webster v. Reid*, 52 U.S. (11 How.) 437, 460 (1837) (Territory of

Iowa); *Kennon v. Gilmer*, 131 U.S. 22, 28 (1889) (Territory of Montana).[24]

And in *Palmore v. United States*, 411 U.S. 389, 397-98 (1973) the Court – at the threshold of its analysis of the question whether within the District of Columbia Congress could delegate an Article III-type Federal Question case to a non-Article III tribunnal – expressly distinguishes between the "plenary power" of Congress under Article I, Section 8, Clause 17 (see note 23, *supra*) and the "other powers delegated to [Congress] under Article I, §8" (emphasis added):

> Art. I, §8, cl. 17, of the Constitution provides that Congress shall have power "[t]o exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia. *The power is plenary.* Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes. Congress "may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States." *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899). This has been the characteristic view in this Court of congressional powers with respect to the District. *It is apparent that the power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. 1, §8.* See *Gibbons v. District of Columbia*, 1 U.S. 404, 408 (1886)."

Then the *Palmore* Court holds that, *within those geographic zones encompassed by the constitutional grants to Congress of plenary power*, Congress may delegate a federal question case within the meaning of Article III to a non-Article III tribunal. 411 U.S. at 400-404. Finally, lest the holding be subject to misconstruction, the Court again reiterates the *limitation* as well as the *extent* of the "plenary power" thus recognized (411 U.S. at 407-08, emphasis added):

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[24]The Government tenders the following sentence in an apparent attempt to avoid this unfortunate embarrassment to its reliance on this line of cases:

> "This is not to say that Congress cannot decide, *either by express statutory command or pertinent silence*, that a particular adjudicator should afford a jury trial. *See, e.g., Webster v. Reid*, 11 How. 437; *Pernell v. Southall Realty, supra*, 416 U.S. at 365-366, 374-75, 383. *C.F. Glidden & Co. v. Zdanok, supra*, 370 U.S. at 549-551."

Gov. Br. 80-81 (emphasis added). But *Pernell's* application of the Seventh Amendment to the Superior Court of the District of Columbia in no sense rests on "Congressional decision" by either "express statutory command" or "pertinent silence". Rather, the Court expressly held that it was foreclosed from reliance on statutory construction as an alternative source for the jury right because of the controlling decision of the District of Columbia Court of Appeals that Congress *had repealed* the potential statutory basis for the jury right. *Pernell, supra*, 416 U.S. at 366. The Court then went on to place its disposition squarely on the Seventh Amendment (416 U.S. at 363), observing that "like other provisions of the Bill of Rights, it is fully applicable to courts established by Congress in the District of Columbia." *See Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1894). *See also Pernell, supra*, 416 U.S. at 370. If the Government's attribution of the result in *Pernell* to "pertinent" Congressional "silence" were accurate, presumably Congress could simply reverse the holding in *Pernell* with appropriate legislation for the Superior Court of the District of Columbia.

Respecting the doctrinal source of the jury right in the territories, *see Rasmussen v. United States*, 197 U.S. 516, 526-528 (1905).

It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction. *Rather, both Congress and this Court have recognized that state courts are appropriate forums in which federal questions and federal crimes may at times be tried; and that the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment.* Here, Congress reorganized the court system in the District of Columbia and established one set of courts in the District with Art. III characteristics and devoted to matters of national concern. It also created a wholly separate court system designed primarily to concern itself with local law and to serve as a local court system for a large metropolitan area.

b. *The Subject Matter Plenary Power Principle* -- In *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), this Court again emphasized Congress' exclusive plenary power over such subject matters as claims against the Government (as opposed to Congress' general regulatory powers). Thus, after tendering the consular courts established in foreign countries as an illustration of Congress' powers to establish legislative courts pursuant to its exclusive powers respecting treaties and foreign commerce, (279 U.S. at 451), the *Bakelite* Court goes on to emphasize the totality of Congressional regulatory power with respect to these subject matters delegable by Congress to "legislative courts" (*id.*, 279 U.S. at 451-52; emphasis added):

> Legislative courts also may be created *as special tribunals* to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. *The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.*
>
> *Conspicuous among such matters are claims against the United States.* These may arise in many ways and may be for money, lands, or other things. They all admit of legislative or executive determination and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.

Also noteworthy is the *Bakelite* Court's discussion of the Court of Private Land Claims as a further illustration of Congress' special power respecting these subject matters. *Id.*, 279 U.S. at 456; compare the *Murray* case, *supra*, 59 U.S. (18 How.) at 284; see p. 38, *supra*.

Thus the *Canter – Bakelite* series of cases, like the *Murray – Oceanic – Helvering* series, confines Congress' power to bypass Article III outside the constitutionally specified geographic zones to those subject matters as to which the Congress has complete and exclusive regulatory power. The paradigm repeatedly offered as illustrative of these subject matters is claims against the United States, be they for money or land. *See McElrath v. United States, supra,* discussed in *Ex parte Bakelite*

Corp., supra, 279 U.S. at 453-54. Compare *NLRB v. Jones & Laughlin*, 301 U.S. 1, 48-49 (1937) relying on *Guthrie National Bank v. Guthrie*, 173 U.S. 528, 537 (1899). See generally Irey Main Br. at 49-51. These cases, far from supporting the Government's "Article I – plenary power – public rights" theory, compel rejection of that theory, a proposition further demonstrated by the simple fact that the Government is not able to provide a single precedent in which this Court has ever held Congress may delegate Article III cases or controversies arising under the Commerce Clause to a non-Article III federal tribunal. The one remaining case offered by the Government in support of its theory is *Crowell v. Benson*, 285 U.S. 22 (1932).

4. The Crowell Case

Crowell v. Benson, 285 U.S. 22 (1932), was an injunction action brought by an employer against the Deputy Commissioner of the United States Employees' Compensation Commission challenging an award of compensation under the Longshoreman's and Harbor Worker's Compensation Act on the grounds that the award was contrary to law because the employee was not employed at the time of the accident. 285 U.S. at 36-37. By amended complaint, the constitutionality of the statute was challenged on three grounds: [1] the Due Process Clause of the Fifth Amendment; [2] The Seventh Amendment; and [3] "the provisions of article 3 with respect to the judicial power of the United States." *Id.*, 285 U.S. at 37. The U.S. District Judge denied a motion to dismiss "and granted a hearing de novo upon the facts and the law, expressing the opinion that the act would be invalid if not construed to permit

such a hearing." *Id.* The employer won on the issue of employment and on appeal the Circuit Court of Appeals affirmed. *Id.* The majority decision (per Chief Justice Hughes) first breaks the issues thus posed into questions of "substantive rights" and questions of "procedural requirements." *Id.* Under the heading of "substantive rights," the Court, noting Congress' "exclusive authority" with respect to maritime law (*id.* at 39), holds that the Fifth Amendment Due Process Clause is not violated by a statute abolishing the employer's substantive liability for damages and creating a non-fault remedy. *Id.*, 285 U.S. at 39-42.[25]

Then under the heading of "procedural requirements," the *Crowell* Court first disposes of the Seventh Amendment contention as follows (*id.*, 285 U.S. at 45):

> As the claims which are subject to the provisions of the act are governed by the maritime law as established by the Congress and are within the admiralty jurisdiction, the objection raised by the respondent's pleading as to the right to a trial by jury under the Seventh Amendment is unavailing (*Waring v. Clarke*, . . .) and that under the Fourth Amendment is neither explained nor urged. The other objections as to procedure invoke the due process clause and the provision as to the judicial power of the United States.

Then the Court holds that *under the due process clause*, the act constitutionally commits questions of fact (other than cases involving constitutional rights) to the final determination of the administrator as long as, *inter*

[25]The *Crowell* opinion on this substantive due process ruling compares Congress' powers to those of the states in enacting the Workman's Compensation laws under the Due Process Clause of the Fourteenth Amendment, citing by way of support, *inter alia*, this Court's opinion in *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917). *See Crowell, supra*, 285 U.S. at 41-42. See the discussion of the *Mountain Timber* case at Irey Main Br. 69-70, n. 32.

alia, the findings are based on the evidence. *Id.*, 285 U.S. 46-48.

Next, the *Crowell* majority reviews the Article III contention (285 U.S. at 48-65), upholding the statute on its statutory interpretation – deemed compelled by Article III to avoid unconstitutionality – that a de novo factual review of jurisdictional issues was compelled to preserve the Article III independent judicial power of the United States and "the fundamental rights" dependent thereon (285 U.S. 56-57; emphasis added):

> In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. *Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions.* It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency – in this instance a single deputy commissioner – for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. *That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.*

It is in the context of this holding that the *Crowell* majority tendered the dictum now relied upon so heavily by the Government in support of its "Article I–plenary power–public rights" theory (285 U.S. at 50-51; emphasis added):[26]

> *As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.* The Court referred to this distinction in Murray's Lessee v. Hoboken Land & Improvement Company, supra, pointing out that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Thus the Congress, in exercising the powers confided to it, may establish 'legislative' courts (as distinguished from 'constitutional courts in which the judicial power conferred by the Constitution can be deposited') which are to form part of the government of territories or of the District of Columbia,* or to serve as special tribunals "to examine and determine various matters, arising between the

[26]We note that just prior to this passage relied on by the Government, the *Crowell* opinion took care to repeat the *Murray* Court's statement that Congress cannot

> "Withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

285 U.S. at 49. The Court then notes that Congress left "to the Federal Court full authority" (285 U.S. at 50) to pass on all questions of law. *Id.* at 50.

government and others, which from their nature do not require judicial determination and yet are susceptible of it." But "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." Ex parte Bakelite Corporation, 279 U.S. 438, 451, 49 S.Ct. 411, 413, 73 L. Ed. 789. Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans.

The present case does not fall within the categories just described, but is one of private right, that is, of the liability of one individual to another under the law as defined. But, in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges. *On the common-law side of the federal courts, the aid of juries is not only deemed appropriate but is required' by the Constitution itself.* In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters, and commissioners or assessors, to pass upon certain classes of questions, as, for example, to take and state an account or to find the amount of damages.

This passage in *Crowell* occurs in the context of a section of the Court's opinion where the fundamental holding is that the constitutional policy concerns underpinning Article III compel the conclusion that a *de novo* hearing in an Article III tribunal must be accorded for all "jurisdictional" facts if the statute is to

be constitutional. This holding, it is critical to note, applied with equal force as far as the *Crowell* majority was concerned to proceedings in which the Government was a litigant and proceedings only between private persons. *See id.*, 285 U.S. 22, 56-65. Moreover, under Chief Justice Hughes' analytical scheme, it is apparent that all questions of law had to be reserved to the Article III tribunal for disposition. See note 26 *supra.*

But this fundamental scheme, as laid out in *Crowell*, died aborning. Thus, the *Crowell* holding, with respect to the Article III requirements for *de novo* review of jurisdictional facts, "has no germinal significance." *See* H. M. Hart & H. Wechsler, *The Federal Courts and The Federal System*, 399 (2d ed., 1973) and sources cited therein at n. 14. Indeed, as Professors Hart and Wechsler point out (*id.*) Chief Justice Hughes himself soon contributed to the internment of this part of the *Crowell* formula in his decision in *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38 (1936). And, as we have noted, *Crowell* itself separately holds that there is no Fifth Amendment due process requirement to *de novo* factual hearings as long as constitutional claims are not involved. Moreover, as we have noted, there is in fact no Fifth Amendment due process requirement whatsoever for participation by Article III tribunals in any phase of litigation. *See Palmore v. United States, supra,* 411 U.S. at 410.

Thus, stripped of the fundamental constraint of *Crowell's* holding on the *de novo* hearing point, the dictum respecting the "government litigant–private litigant" dichotomy,[27] in effect, becomes an engine for the

[27] As we discuss within, p. 56 *infra*, Chief Justice Hughes' "private rights–public rights" dichotomy in *Crowell does not* conform to the Government's Article I–plenary power–public rights theory; rather, the *Crowell* conception reflects a government litigant–private litigant distinction.

virtual demolition of the independent federal judicial power in all of the most important classes of cases. That, of course, explains why the dictum has had no germinal significance in the development of this Court's law in this area. Indeed, the Chief Justice himself, when confronting the Seventh Amendment issue in *NLRB v. Jones & Laughlin*, 301 U.S. 1, 48-49 (1937) makes no mention whatsoever of the *Crowell* case, and instead rests the disposition of the Seventh Amendment point on, *inter alia*, *Guthrie National Bank v. Guthrie*, 173 U.S. 528, 537 (1899).[28] The *Guthrie* case holds that a claim against the sovereign is not covered by the Seventh Amendment because it is not in the nature of a suit at common law. Thus did the Chief Justice return the basic analysis to the familiar paradigm which, from the *Murray* case on, has been used to confine the scope of Congressional discretion to bypass Article III and the Seventh Amendment to those special subject matters where Congress' regulatory power is truly "plenary". *See Palmore v. United States, supra,* 411 U.S. at 407-08.[29]

Moreover, the *Crowell* dictum on its own terms doesn't support the Government's "Article I–plenary power–public rights" theory. Thus, the Government offers the following view of this dictum (Gov. Br. at 73):

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[28]We present our view of *NLRB v. Jones & Laughlin, supra,* in our main brief at 46-65. We agree with the Government that it is significant that the *Jones & Laughlin* case was written by the author of the *Crowell* case. *See* Gov. Br. 74. However, the observation seems to cut against the government's interpretation of *Jones & Laughlin*, since the Chief Justice did not in any part rely on the *Crowell* case and instead relied quite heavily on the *Guthrie* decision. *See* Irey Main Brief, at 50-53.

Respecting the *Jones & Laughlin* case, we call the Court's attention to the equitable nature of a back pay award in a labor proceeding as "restitution" to the worker. *See Rogers* v. *Loether*, 467 F.2d 1110, 1121-22 (8th Cir., 1972) *aff'd sub nom. Curtis* v. *Loether, supra.*

[29]We also observe that, were this Court today "writing on a clean slate," *cf., Kliendienst* v. *Mandel, supra*, 408 U.S. at 766, it is

(continued)

> Significantly, while the opinion went on generally to sustain administrative factfinding even in this private-right sphere, it did so on the theory that the commission was an integral and immediate adjunct of Article III courts analogous to juries and masters, not an independent agency, 285 U.S. at 51-54. *See* Jaffe, *Judicial Control of Administrative Action* 88-89 (Abr. Ed., 1965). Implicit in this analysis is the assumption that where, and only where, exclusively Article III private (rather than Article I plenary public) rights are involved, the judicial institutions inherent in Article III–including a jury trial where mandated, 285 U.S. at 51–must be preserved.

This view is squarely contradicted by the very text of the passage relied upon. *First*, there is no way the *Crowell* opinion can be read as suggesting that the constitutional jury right automatically falls once the Article III barrier to a Congressional bypass of the Federal Judiciary in favor of an administrative tribunal is hurdled. Thus, as we have noted, the Seventh Amendment jury issue is expressly dealt with separately from the "distinct question" posed by "[t]he contention based upon the judicial power of the United States, as extended 'to all Cases of admiralty and maritime Jurisdiction' (Const. art. 3)." *Id.*, 285 U.S. at 48-49. More importantly, the *Crowell* dictum itself tenders, as an illustration of the cateogry of cases as to which Congress can bypass the Article III judicial power, the legislative court cases relating to the District of Columbia, concerning which this Court has repeatedly stated "the Seventh Amendment . . . [l]ike other provisions of the Bill of Rights . . . is fully applicable. *See*

(footnote continued from preceding page)
possible that cases such as *Oceanic* and *Sabaudo* would have been decided differently. We submit that even within zones of congressional plenary power, the discretion of Congress to bypass Article III should be restricted to those instances where, based on strict historical analysis, it can truly be said that the subject matter of the litigation is not in the nature of a common law suit. *See* the *Murray* case, *supra.*

Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899)." *Pernell v. Southall Realty, supra*, 416 U.S. at 370. *See generally* note 24, *supra*. There can be no doubt as to the *Crowell* majority's cognizance of this principle, given the quotations from and reliance upon the *Capital Traction Co.* case by the *Crowell* majority in support of its holding on the Article III issue. *Id.*, 285 U.S. at 61.

Second, this *Crowell* passage, in any event, certainly offers no "implicit" support for the Government's "Article I–plenary power–public rights" theory. Thus, the Government expressly acknowledges that the logic of its theory *cannot* turn on the identity of the litigant enforcing the "public right" as a governmental agent as opposed to a private person (*id.* at 62-63). That conception of "public rights" is most certainly *not* the conception articulated in this passage from the *Crowell* opinion. Thus, the *Crowell* majority distinguishes "between cases of private right and those which arise between the government and persons subject to its authority in connection with the performance of the constitutional function of the executive or legislative branches." *Id.* at 50. The *Crowell* case, then, is using the "public–private" dichotomy precisely in the sense the Government expressly eschews it, a proposition confirmed by Crowell's treatment of this Longshoreman's Workman's Compensation case as a "private right" case analogous for Fifth Amendment substantive due process purposes to the state Workman's Compensation cases and specifically the *Mountain Timber* case. *See* note 25, *supra*. *See also* Justice Brandeis' dissent in *Crowell*, 285 U.S. at 87-88, n. 54. Compare Gov. Br. at 63.

III.

AN OSHA NON-JURY PENALTY ADJUDICATION CANNOT BE SUSTAINED UNDER THE RATIONALE OF KATCHEN V. LANDY.

The Government offers one last contention after their principle arguments (Gov. Br. at 19):

> 3. Finally (pp. 81-88, *infra*), invoking *Katchen v. Landy*, 382 U.S. 323, we suggest that the agency created to adjudicate these cases is like a specialized statutory court of equity which can exercise summary jurisdiction over otherwise jury-triable issues if the interposition of a jury would dismember the statutory scheme. That analogy is justified, we say, because the Review Commission's primary task is to grant or deny permanent injunctive relief respecting alleged safety and health violations endangering workers, to which the discretionary power to impose limited civil monetary penalties is integral.

We submit that this argument fails because: (a) the *Katchen* case does not apply to involuntary defendants in penalty proceedings; and (b) in any event, there would be no "dismemberment" of the statutory scheme if Congress allowed *de novo* jury trials in district court in penalty cases.[30]

A. The rationale of Katchen is not applicable to civil penalty adjudications for statutory violations.

In *Katchen*, this Court first sustained a bankruptcy court's statutory summary jurisdiction over voidable preferences, expressly limiting its holding as follows (382 U.S. at 332-33, n. 9):

> Rather, our decision is governed by the "traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. *Wiswall v. Campbell*, 93 U.S. 347, 351." *Gardner v. New Jersey*, 329 U.S. 565, 573. As this is the basis of our

[30] *See* also the panel majority decision in the Irey case, Irey Cert App. 86-96, n. 11.

> decision, we obviously intimate no opinion concerning whether the referee has summary jurisdiction to adjudicate a demand by the trustee for affirmative relief, all of the substantial factual and legal bases for which have not been disposed of in passing on objections to the claim.

The Court sustained the statutory power to affirmatively demand surrender of the voidable preference on the reasoning that once the bankruptcy court "has dealt with the preference issue [in ruling on the creditor's claim] nothing remains for adjudication in a plenary suit," by virtue of *res judicata* and *collateral estoppel*. 382 U.S. at 334; *see* 382 U.S. at 334-35.

Then the Court dealt with the claim that "this reading of the statute violates [the creditor's] Seventh Amendment right to a jury trial." 382 U.S. at 336. The Court recognized that in a plenary suit by the trustee, the creditor would have a Seventh Amendment right to a jury trial. *Id., citing Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932). But the Court rejected that claim in *Katchen* on the reasoning that: (1) a creditor's claim in a bankruptcy court is an *equitable* claim to share on a pro rata basis in the *res* of the bankrupt's estate (382 U.S. at 336); (2) the bankruptcy court's jurisdiction to determine the creditor's equitable claim to a share of the *res* encompasses the power to resolve the trustee's objection to the claim on the ground of a preference, 382 U.S. 336-37 *citing, inter alia, Barton v. Barbour*, 104 U.S. 126, 133-34 (1881); and (3) given the doctrine of *res judicata*, the power to determine the preference objection to the creditor's claim encompasses the power to order affirmative relief against the creditor-claimant as a matter of decreeing "complete relief" (382 U.S. at 337-38; quote from p. 338).

Up to this point in the *Katchen* opinion not a word is said about the doctrine of *Beacon Theaters v. Westover*, 359 U.S. 500 (1959) or "dismemberment" of the statutory scheme. The Court's holding on the claim

to entitlement as a matter of constitutional right to a jury is strictly limited to a bankruptcy court's equitable clean-up powers over a creditor who invokes the bankruptcy court's jurisdiction by submitting a claim. In fact, because of Seventh Amendment considerations, one court has held the *Katchen* rationale cannot even be extended to the guarantor on a creditor's note who files a claim in bankruptcy court in the creditor's name in order to protect the guarantor's subrogation rights. *See In Re Beasley-Gilbert's, Inc.*, 285 F.Supp. 359, 361-63 (S.D. Ohio, 1968) (alternative holding). Moreover, the *Katchen* rationale also does not extend to trustee's attempts to bring an action for damages against individuals for a breach of a contract relating to the *res*, see *Hollywood National Bank v. Bumb*, 409 F.2d 23, 24-25 (9th Cir. 1969), nor to counterclaims against creditor-claimants "which do not involve a preference, setoff, voidable lien, or a fraudulent transfer, and which are wholly unrelated to the creditor's claims." See the lower court's decision in the *Katchen* case, 336 F.2d 535, 537 (10th Cir. 1964).

These various restrictions on the reach of the *Katchen* rationale can be illustrated by considering a hypothetical bankruptcy statute. Suppose Congress declared that hereinafter bankruptcy trustees would have summary powers to bring plenary suits against creditors seeking (a) return of the preference and (b) penalties in amounts of $1,000 for constructive frauds by the creditor related to the preference and (c) penalties of up to $10,000 for deliberate frauds. Would such a statute conceivably pass constitutional muster under the *Katchen* rationale? We think not, even granting Congress' special plenary regulatory powers under the Constitution to "establish . . . uniform . . . laws on the subject of bankruptcy" throughout the United States. U.S. Const. art. I, §8; *see Katchen, supra*, 382 U.S at 336. *A fortiori*, such a statute rested strictly on Congress' interstate commerce powers would be invalid.

The *Katchen* opinion then goes on to reject the creditor's "final reliance . . . on the doctrine of *Beacon Theaters v. Westover*, . . . and *Dairy Queen v. Wood*, . . ." 382, U.S. 338. The Court observed that (*id.*, emphasis added):

> The argument here is that the same issues–whether the creditor has received a preference and, if so, its amount–may be presented *either as equitable issues* in the bankruptcy court *or as legal issues* in a plenary suit. . . .

The Court had, of course, just determined that Congress could prescribe non-jury determination of the *substantive issue* of "preference" as a part of determining the creditor-claimant's *equitable* claim to the *res*. In rejecting the final contention based strictly on the *Beacon* case doctrine "which is itself an equitable doctrine. . . ." (*Katchen, supra*, 352 U.S. at 339) the Court stated that *Beacon* and *Dairy Queen* did not involve "a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury" (382 U.S. at 339; *see* Gov. Br. at 84) and that "to say that because the trustee could bring an independent suit against the creditor to recover his voidable preference, he is not entitled to have his statutory objection to the claim tried in the bankruptcy court in the normal manner is to dismember a statutory scheme which Congress has prescribed. *See Alexander v. Hillman*, 296 U.S. 222, 243." (*Katchen, supra*, 382 U.S. at 339; *see* Gov. Br. at 84). The "dismemberment" of the statutory scheme would occur because the *Beacon–Dairy Queen* doctrine, if extended to voidable preferences, would necessitate a jury trial on the substantive preference issues regardless of whether the trustee seeks affirmative relief against a claimant who invoked the bankruptcy court's jurisdiction (382 U.S. at 339):

> For, as we have said, determination of the preference issues in the equitable proceeding would in any case render unnecessary a trial in the plenary action because of the *res judicata* effect to which that determination would be entitled.

Thus the *Katchen* rejection of the *Beacon* equity principle follows strictly from the established power of the bankruptcy court to decide the substantive preference issue as a part of its jurisdiction over the creditor's entire "equitable" claim. Nothing in these portions of *Katchen*–by "analogy" (Gov. Br. at 19) or otherwise–would support extension of the bankruptcy court's summary jurisdiction to a plenary suit by the trustee against a creditor who did not invoke the equity powers of the bankruptcy court and who would otherwise have a Seventh Amendment jury right in the trustee's plenary suit. *Cf. United States v. J. B. Williams Co.*, 498 F.2d 414, 428 (2d Cir. 1974). Indeed, to so read *Katchen's* discussion of *Beacon* is to turn the *Katchen* case upside down and, in effect, to use *Katchen* to dismember the Seventh Amendment. *See also* Irey Main Br. at 65-67.

B. In any event, a jury trial on penalty adjudications would not interfere with the statutory scheme.

1. Assuming *arguendo* that the "dismemberment" principle of *Katchen* extended to the OSHA statutory scheme, the policy arguments tendered by the government do not justify overriding the Seventh Amendment jury right.[31] In our main brief we presented our view of the policy interests in favor of recognition of the Seventh Amendment jury right after the administrative process is complete. Irey Main Br. at 71-83. Here we note that if the government's primary argument based on historical evidence fails, then the Seventh Amendment is indeed to be viewed as "a strong shield against

[31]We submit that these cases are, in any event, governed by the clear command of the Seventh Amendment. *See* Irey Main Br. at 71-75.

governmental oppression." Gov. Br. at 37; *see* our discussion of *Duncan v. Louisiana*, 391 U.S. 145 (1968) and *United States v. United States District Court*, 407 U.S. 297 (1972) at Irey Main Br., 76-79. Moreover, in attempting to persuade this Court that the Founding Fathers would not have deemed it necessary to guard against federal governmental oppression in the very category of cases that triggered revolutionary ferment against the British Government (*i.e.*, civil penalty and forfeiture proceedings) the Government argues, *inter alia*, (Gov. Br. at 43):

> Moreover, an independent judiciary with life tenure was now provided for and the abuses of judges removable at whim by the Crown were no longer to be feared. . . .

Yet, if the Government's "Article I–plenary power–public rights" theory is accepted, then all defendants in civil governmental penalty proceedings will be deprived of the constitutional guaranty of an Article III independant judge on any issues in their cases. *See* p. 33 *supra*.[32]

Finally, we are also told that since "even criminal fines up to at least $500 may be exacted without the intervention of a jury" (Gov. Br. at 82) "[i]t would be most remarkable if . . . the Seventh Amendment were construed . . . to require a civil jury trial where the Sixth Amendment would not interpose a jury if the penalties were criminal." (*Id.*) This argument also cuts the other way. Assuming criminal defendants are entitled to jury trials in cases where the potential fine is above $500, it would be most remarkable, in the face

[32]Conversely, we agree with the Government's observation concerning its "Article I–plenary power–public rights" theory (Gov. Br. at 58):

> Yet, it is not easy to reconcile such a rule with the assumption that the Seventh Amendment was meant to interpose a screen of ordinary citizens between the government and the people in civil cases.

of the Seventh Amendment's express protection of the jury right in "common law" actions where more than $20 was at stake, if that jury right could disappear by labeling the case "civil." Indeed, a corporate defendant (such as petitioners here) is in exactly the same posture with respect to exposure to penalties in *any* criminal case where the maximum fine is $10,000, a sum that is typically the maximum fine for criminal cases under title 18 of the U.S. Code, and also happens to be the maximum fine for criminal prosecutions under Section 17(e) of OSHA. *See* 29 U.S.C. §666(e).[33]

Both the Seventh Amendment–limited by its terms to cases in excess of twenty dollars–and the Sixth Amendment pose "line-drawing" problems in terms of the minimal level of severity of punishment required before the jury right comes into play. Those line-drawing problems are present not merely with respect to monetary penalties, but also with respect to length of prison terms for purposes of differentiating between petty and criminal offenses in the context of the Sixth Amendment. *E.g., Baldwin v. New York*, 399 U.S. 66 (1970). The various choices made by the Court in resolving these issues do not provide an appropriate basis for setting the contours of the jury right under either constitutional provision with respect to substantive categories of cases. *See Baldwin v. New York, supra*, 399 U.S. at 73 (opinion of Justice White); Irey Main Br. at p. 61. *See also* our discussion of the Fifth Circuit's "single red sou" argument in the *Atlas* case in our main brief at 46, n. 23.

Thus the policy considerations in favor of recognition of a Seventh Amendment jury right remain substantial, particularly in the context of a "civil" statute which is the moral equivalent of a federal homicide statute for

[33]It is the "maximum authorized penalty" under the statute in question that provides the "line-drawing" standard for differentiating "petty" from "serious" offenses under the Sixth Amendment. *See Baldwin v. New York*, 399 U.S. 66, 68 (1970) (opinion of Justice White).

employers charged with knowingly or negligently creating homicidal risks for their workers. Turning to the Government's "dismemberment" policy arguments, we submit there is little basis for believing that recognition of a *de novo* jury right in district court after the administrative process is complete will interfere with the regulatory interests represented by the statute.

2. The Government, relying on the legislative history of OSHA, argues (Gov. Br. at 88):

> That Congress rejected juries as factfinders is unsurprising given its repeated emphasis on the related enforcement goals of speedy final abatement orders, expert determination, and nationwide uniformity of both obligations and results. Leg. Hist. 144, 194-195, 462-471, 845, 854. Those goals are basically incompatible with the delays and unpredictable *ad hoc* determinations of juries. . . .

Of course, any law enforcement program—civil or criminal—may require some "expert" determinations (*e.g.*, insanity defenses), speedy justice, and nationwide uniformity of obligations and results. We do not doubt Congress desired these characteristics for OSHA, and, indeed, for every enforcement statute in the United States Code. But neither the legislative history nor analysis of the statutory scheme supports the contention that a jury right in penalty cases after the administrative process is complete will seriously interfere with these desired goals.

The Government emphasizes that (Gov. Br. at 84, footnote omitted):

> Congress created the Review Commission for the overriding equitable purpose of assuring the swift issuance of injunctions directing abatement of work-related hazards threatening employees. The Act's *raison d'etre* is abatement, not penalty assessments, which were included only to promote

> voluntary abatement by employers prior to inspection. . . .

See also Gov. Br. at 84, n. 97. If that is so, then in those cases in which penalties are sought for past violations of the Act under 29 U.S.C., §666(a)-(c) (rather than failure to abate under 29 U.S.C., §666(d)) there can be little risk of interference with the Act's *raison d'etre* (*i.e.*, abatement, not penalty assessment) from a jury trial.

But the Government's emphasis on penalties for past violations as intended to deter future violations does focus attention on the real policy question relating to the *Act's* enforcement goals. As the House Committee Report puts it (Leg. Hist. 853, 856), "Death and disability prevention is the primary intent of this bill. Although possible penalties for violation may be an important deterrent, they are only a partial solution."

Now who is to be "deterred" from violating the Act, and what is necessary to achieve the legislative goal of deterrence? The OSHA statute covers practically the entire business world in our country. Specifically, according to the Government, "the Act covers nearly 65 million workers and 5 million workplaces." *See* Gov. Br. at 90, n. 102. This Court needs no statistical barrage to recognize that we are not dealing here with a regulatory scheme aimed at just one industry, where the employers can perhaps be presumed to share some common "expertise" with the regulators. Nor does the Act aim just at the powerful rich companies with the lawyers and personnel safety experts to cope with highly technical regulations. If OSHA is ever to work *as a deterrent to future violations*, the rules and regulations must be capable of self-application by the average non-expert American businessman, operating without teams of lawyers and safety experts to explain to him his primary legal duties and obligations. Indeed, when it remembered that "the Secretary's current inspection force stands at less than 1,300, an increase of almost

1,000 from Fiscal 1972," (Gov. Br. at 90, n. 102) it is apparent that in deterrent terms OSHA will be a dead letter if the rules are not capable of self-application. Thus the *regulations* in this statutory scheme *must be drawn with a view toward their application by lay businessmen.* This means that the *expertise* function comes into play primarily in the formulation of the regulation, a function placed by the Act in the hands of the Secretary and which is not involved in this case. When it comes to deterring future businessmen from violating the Act by punishing past violations, the critical element is to be certain that the rules are capable of self-application by business men and their employees, who have a great deal more in common with lay jurors than they do with the expert regulators. A useful role in such a statutory scheme can be played by lay jurors who, under the careful instruction of federal district judges informed as to the purpose of the rule by virtue of a complete administrative record, must then apply the rule just as the businessman-defendant must apply it. If a particular rule or regulation is so bound up "with the statutory and policy matrix in which particular facts are found and are to be evaluated" (Gov. Br. at 88, n. 101) that uniform application by lay jurors is unlikely, the message to the regulators should be to change the rule, not avoid the lay jury.

And these are the judgments which are truly reflected by the legislative history of OSHA. Thus, as the Government states, Congress never even considered juries as factfinders. Gov. Br. at 87. The portions of the legislative history principally relied on by the Government in support of its "dismemberment" contention concern the choices to be made between enforcement by the Secretary of Labor and enforcement by a separate Review Commission. Nobody focused on the possible impact of lay jury participation after completion of the administrative process on the legislative goals.

More importantly, these portions of the legislative history actually involved a simultaneous debate over two issues: (1) where the rulemaking function should be reposed; and (2) where the adjudicatory function should be reposed. Thus the Williams Bill in the Senate (S. 2193), and the Daniels Bill in the House (H.R. 16785) placed the rulemaking function and the adjudicative function with the Secretary of Labor. *See* Leg. Hist. 204, 239-46, 255-58 (S. 2193); *id.*, 893, 940-45; 953-55 (H.R. 16785). The Steiger Amendment (H.R. 19200, Leg. Hist. 763) would have placed the rulemaking function in one independent agency to be called the "National Occupational Safety and Health Board" (Leg. Hist. 764-65, 770-76) and the adjudicative function in another independent agency to be called the "Safety and Health Appeals Commission." Leg. Hist. 785-95. The compromise position (which ultimately prevailed) was represented by the Javits Amendment (Amendment No. 1060 to S. 2193, *see* Leg. Hist. 380-91). This Amendment left the rulemaking function with the Secretary, shifting only the adjudicative function to an independent agency. Leg. Hist. 381-91.

Senator Javits, in defending his "compromise" (Leg. Hist. at 463), demonstrated his understanding of the distinction for enforcement purposes between rulemaking and adjudication. Leg. Hist. 392-93; 464-65. His remarks do not reflect any genuine emphasis on the need for "expertise" in the adjudicative function. *See* Leg. Hist. 392-93; 462-65; 471-72.

By contrast, the legislative materials regarding the Steiger Amendment do reflect a concern that the rulemaking function be in the hands of qualified experts. Leg. Hist. 877-78. That reflects the fact that this proposal would have split off the rulemaking function. Indeed, in defending this proposal, Rep. Steiger articulated the difference between regulatory programs that cover the whole of American business, and those that

aim at a specific segment or industry (Leg. Hist. at 990):

> It has been argued, Mr. Chairman, that Congress has often placed all the functions of standard setting, inspection and enforcement in one department of the agency. Opponents of the Board cite such acts as the Longshoremen's and Harbor Workers' Safety Act, the Coal Mine Safety Act, the Federal Railroad Safety Act and others. I must point out that each of these acts deals with a specific area of concern and is limited in application. The occupational health and safety legislation before us today deals with every conceivable type of industry and business and I submit that such a responsibility merits and needs a different administrative approach.

In fact, the legislative history shows the real concern of Congress in getting intelligible standards and regulations capable of self-application by American businessmen. This is shown in the legislative history materials reflecting the narrowing of the "General Duty" clause of the Act to reach only those recognized hazards "that are causing or are likely to cause death or serious physical harm . . . to employees. . . ." 29 U.S.C. 655(a). *See* Leg. Hist. 534-35; 880-81; 1092-93; 1186. Here, too, the difference between a general regulatory program for all of American business and a program aimed at one industry or section was pointed out. Leg. Hist. 880-81. The importance to the statutory scheme of intelligible standards was well understood by the Congress, both for penalty purposes (Leg. Hist. 856) and "voluntary compliance." *Id. See generally id.*, 857-60; 879-80.

With respect to the goal of "uniform" law enforcement, the emphasis was on the need for uniform nationwide regulations in place of state-by-state variations (*e.g.*, Leg. Hist. 144; 193; 513) and a nationwide commitment of enforcement resources instead of state-by-state variation in the level of effort and funding that

went into the programs. Leg. Hist. 513; 853-54; 865. Nobody evaluated the impact on the "uniformity" goal of the possible variation in results in particular instances in those small number of cases which even get to a jury where the regulation was sufficiently confusing that lay juries properly instructed by district judges could not apply it consistently to the facts.

3. In sum, there is little basis in the legislative history for contending that a jury trial, after the administrative process is complete, will interfere with the aims of the Act. Nor is there any basis for concern that allowing a jury right will crowd the dockets of the federal courts. Thus, the Government argues that "OSHA is currently issuing more than 100,000 citations annually, 5 per cent or 5000 of which are contested"—a figure which constitutes fully one-third of the administrative penalty cases reported by Professor Goldschmid for the entire federal establishment in 1972, and threatens to place a large number of "additional cases in a [district court] system 'already being engulfed by a tidal wave of litigation.'" Gov. Br. at 89-90, n. 102. But examination of the "Monthly Status Report of OSAHRC Decisions Which Have Been Appealed," dated October 1, 1976 (available from the Public Information Office of O.S.H.R.C.) reveals that from May 15, 1972 through to September 8, 1976, a total of 290 cases have been appealed from the administrative adjudication to the Court of Appeals.[34] That represents an average of 52 cases a year.[35] What kind of an increase can seriously be projected if a *de novo* jury right were allowed by Congress, especially when the average dollar amount at stake for serious violations has been $617, for willful and repeated violations, $409, and for non-serious

[34] A copy of this report is attached hereto as Appendix A.

[35] This figure was reached by dividing the total number of cases by five years, seven months (the effective date of OSHA through November 1, 1976) and rounding to the nearest whole number.

violations, $12? *See* Gov. Br. at 82, n. 92. Indeed, what kind of an increase can seriously be projected when, for the past 200 years the Congress in the vast majority of penalty cases has allowed *de novo* jury rights? *See* Irey Main Br. at 83-86. Thus the 1976 Annual Report of the Director of the Administrative Office of the United States Courts, presents at p. 86, Table 19, a summary of all civil cases pending in the United States district courts for the past nine fiscal years, broken down by nature of suit. *See* Appendix B hereto. For the year 1976, a total of 140,189 suits are pending in all U.S. district courts, 1,692 of which represent governmental forfeiture and penalty cases. In percentage terms, this represents 1.2 per cent of the total. There may be a tidal wave of litigation in our federal courts, but nothing this Court does in this category of cases is going to have any impact on it. More fundamentally, these considerations are not sufficient to save the penalty provisions of OSHA in the face of the clear command of the Seventh Amendment. *Cf., Curtis v. Loether, supra,* 415 U.S. at 198.

CONCLUSION

For the foregoing reasons, the judgments of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

OCTOBER 1, 1976

MONTHLY STATUS REPORT
OF
OSAHRC DECISIONS
WHICH HAVE BEEN APPEALED

Distribution
- Commissioners
  - Chief Legal Counsel
  - All staff attorneys
- Executive Director
  - Executive Secretary
  - Director, M.I.S.
  - Director of Public Information
  - Review Staff
- Chief Administrative Law Judge
  - All Judges
  - ibrary

NOTE: The appeal was filed by the Respondent unless indicated. An asterist (*) beside the case name means that the appeal was filed by the Complainant (Secretary of Labor).

SOURCE – Public Information Office of the Occupational Safety and Health Review Commission

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
477	Accu-Namics	7/26/1974	7/11/1975 Denied-Rhrg.	515 F.2d 828 (5th Cir., 1975)
477	Accu-Namics		9/26/1975 Denied-Rhrg.	521 F.2d 814 (5th Cir., 1975)
477	Accu-Namics		3/29/1976 Cert. Denied	96 S.Ct. 1492
5284	Ace Sheeting & Repair Co.	2/23/1976		76-1481 (5th Cir., 1976)
5599	Allis-Chalmers Corp.	12/12/1975	7/28/1976 Affirmed	75-2125 (7th Cir., 1975)
1228	*Alsea Lumber Co. (See Hendrix, Raymond)	5/25/1973	2/24/1975 Affirmed	511 F.2d 1139 (9th Cir., 1975)
9392	American Airlines	1/06/1976	6/04/1976 Withdrawn	__F.2d__ 76-4001 (2nd CA)
10	American Smelting & Refining Co. (Am. Smelt. & Ref. Co. V. OSAHRC, Un. Steelworkers of Amer., Local 461 and Peter J. Brennan, Sec. of Labor	10/09/1973	7/15/1974 Affirmed	501 F.2d 504 (8th Cir., 1974)

2578	Ames Crane & Rental Service	8/06/1975	4/01/1976 Denied	532 F.2d 123 (8th Cir., 1976)
3769	Amoco Oil Co.	3/04/1976		76-1220 (7th Cir., 1976)
3322	*Anchorage Plastering Co.	8/08/1975		__F.2d__ 75-2747 (9th CA)
3439	Anning-Johnson Co. (Anning-Johnson Co. & Workinger Electric, Inc. v. U.S., OSAHRC & Peter J. Brennan, Secretary of Labor)	5/13/1974	5/27/1975 Reversed	516 F.2d 1081 (7th Cir., 1975)
3701	*Aqua View Apts. (See Lacy, Franklin R.)			
2375	Arkansas-Best Freight Systems, Inc.	4/16/1975	1/29/1976 Denied	529 F.2d 649 (8th Cir., 1976)
10198	Armor Construction & Paving, Inc.	2/07/1975	3/13/1975 Dismissed	75-4028 (2nd Cir., 1975)
425	Armor Elevator Co., Inc.	10/06/1972	2/27/1973 Dismissed	73-2249 (6th Cir., 1973)
426	Armor Elevator Co., Inc.	10/06/1972	2/27/1973 Dismissed	73-2249 (6th Cir., 1973)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
1018	Ashworth, Uriel G., Masonry Contractors, Inc.	3/25/1975	3/03/1976 Affirmed & remanded in part w/instructions)	538 F.2d 562 (4th Cir., 1976)
3824	Atlantic & Gulf Stevedores, Inc.	2/05/1976	6/01/1976 Dismissed	75-2454 (3rd Cir., 1975)
3870	Atlantic & Gulf Stevedores, Inc.	2/05/1976	6/01/1976 Dismissed	75-2454 (3rd Cir., 1975)
4019	Atlantic & Gulf Stevedores, Inc.	2/05/1976	6/01/1976 Dismissed	75-2454 (3rd Cir., 1975)
4517	Atlantic & Gulf Stevedores, Inc.	2/05/1976	6/01/1976 Dismissed	75-2454 (3rd Cir., 1975)
4997	Atlantic & Gulf Stevedores, Inc.	2/05/1976	6/01/1976 Dismissed	75-2454 (3rd Cir., 1975)
6741	Atlantic & Gulf Stevedores, Inc.	12/29/1975	5/18/1976 Dismissed	75-2453 (3rd Cir., 1975)
6961	Atlantic & Gulf Stevedores, Inc.	3/01/1976	5/18/1976 Dismissed	75-2453 (3rd Cir., 1975)

2818	Atlantic & Gulf Stevedores, Inc.	6/06/1975	3/26/1976 Affirmed	534 F.2d 541 (3rd Cir., 1976)
2100	Atlantic Marine Inc. and Atlantic Dry Dock Corp.	1/28/1975	12/08/1975 Vacated	524 F.2d 476 (5th Cir., 1975)
2101	Atlantic Marine Inc. and Atlantic Dry Dock Corp.	1/28/75	12/08/1975 Vacated	524 F.2d 476 (5th Cir., 1975)
1130	Atlas Roofing Co.		3/22/1976 Cert. Granted	96 S.Ct. 1458
1130	Atlas Roofing Co. (Atlas Roofing Co., Inc. v. OSAHRC & John T. Dunlop, Secretary of Labor	6/04/1973	8/08/1975 Affirmed	518 F.2d 990 (5th Cir., 1975)
10686	Baltimroe & Ohio RR Co.	12/01/1975		__F.2d__ 75-2163 (D.C. CA)
10832	Baltimore & Ohio RR Co.	12/01/1975		__F.2d__ 75-2163 (D.C. CA)
557	Beall Construction (Beall Const. Co. v. OSAHRC et al)	4/24/1974	12/18/1974 Affirmed	507 F.2d 1041 (8th Cir., 1974)
3901	Beatty Equipment Leasing Inc.	7/09/1976		76-2497 (9th CA)
5064	Bechtel Power Corp.	5/06/1976		76-1365 (8th Cir., 1976)
8392	Bethlehem Steel Corp.	11/14/1975	7/20/1976 Affirmed/ Vac./Part	__F.2d__ 75-2301 (3rd CA)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
1988	Bloomfield Mech. Contr. Inc., & Bloomfield-Blumin, a Joint Venture (Bloomfield Mech. Contr. Inc., V. OSAHRC & Peter J. Brennan Sec./Labor	5/15/1974	8/11/1975 Remand	519 F.2d 1257 (3rd Cir., 1975)
2944	Boise Cascade Corp.	2/06/1976		76-1281 (9th Cir., 1976)
6435	Bonners Ferry Lumber Co.	11/11/1975	4/23/1976 Dismissed	__F.2d__ 75-3468 (9th CA)
1166	*Bounds, J.W., d/b/a Pearl St. Erection Co. (Peter J. Brennan, Sec. of Labor v. OSAHRC and J.W. Bounds (Pearl St. Erection Co.)	3/09/1973	12/11/1973 Affirmed	488 F.2d 337 (5th Cir., 1973)
83	*Bratcher, Norman R., Co.	4/26/1973	8/24/1973 Dismissed	73-1927 (5th Cir., 1973)
1003	*Brent Towing Co. (Peter J. Brennan, Sec. of Labor v. OSAHRC and Brent Towing Co., Inc.)	11/21/1972	7/02/1973 Vacated	481 F.2d 619 (5th Cir., 1973)

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8454	Buckeye Industries, Inc.	2/19/1976		76-1467 (5th Cir., 1976)
1342	Buckley & Co., Inc. (Buckley & Co., Inc. v. Sec. of Labor)	4/15/1974	1/03/1975 Remanded	507 F.2d 78 (3rd. Cir., 1975)
215	Budd Company, Inc. (Ind. Union, UAW and its Locals 813 and 92 v. OSAHRC)	4/10/1974	3/24/1975 Affirmed	513 F.2d 201 (3rd Cir., 1975)
199	Budd Company, Inc. (The Budd Co., v. OSAHRC)	4/10/1974	3/24/1975 Affirmed	513 F.2d 201 (3rd Cir., 1975)
583	*Buhl Laundry & Dry Cleaning, Inc.	6/26/1973	9/24/1973 Dismissed	73-1418 (8th Cir., 1973)
689	*Burik & Savko Lumber & Supply Co., Inc.	2/28/1973	11/08/1973 Withdrawn	73-1182 (3rd Cir., 1973)
11325	Burlington Northern, Inc.	12/15/1975		75-1943 (8th Cir., 1975)
11418	Burlington Northern, Inc.	2/06/1976		76-1098 (8th Cir., 1976)
855	Butler Lime and Cement	11/[illegible]/1974	9/05/1975 Remand	520 F.2d 1011 (7th Cir., 1975)
5106	CTM, Inc.	8/30/1976		76-1789 (10th Cir., 1976)
668	California Rotogravure Co.	3/27/1975		__F.2d__ 75-1743 (9th CA)

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OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
14	California Stevedore & Ballast Co. (California Stevedore & Ballast Co. vs. OSAHRC)	11/01/1973	5/21/1975 Affirmed	517 F.2d 986 (9th Cir., 1975)
4675	Candler-Rusche, Inc.	7/16/1976		76-1645 (D.C. Cir., 1976)
10659	Capa Iron Works, Inc.	9/08/1975	10/21/1975 Withdrawn	74-4185 (2nd Cir., 1975)
1186	Cape & Vineyard Div./N Bedford Gas Edison Lgt. Co. (Cape & Vinyard Div. N Bedford Gas/ Edison Lgt. Co. vs. OSAHRC)	7/18/1974	3/03/1975 Reversed	512 F.2d 1148 (1st Cir., 1975)
2547	Caribtow Corp. v. OSAHRC	12/20/1973	3/18/1974 Denied	493 F.2d 1064 (1st. Cir., 1974)
7909	*Carr Erectors	8/03/1976		76-2026 (6th Cir., 1976)
5183	Chesapeake & Ohio Railway Co.	2/18/1975		__F.2d__ 75-1182 (4th CA)
224	Chicago Bridge & Iron Co.	2/26/1973	5/31/1973 Dismissed	73-1181 (7th Cir., 1973)

744	*Chicago Bridge & Iron Co.	3/18/1974	4/22/1975 Vacated & Remanded	514 F.2d 1082 (7th Cir., 1975)
224	Chicago Bridge and Iron Co.	2/24/1975	5/10/1976 Affirmed	535 F.2d 371 (7th Cir., 1976)
5860	Chicago, Milwaukee, St. Paul & Pacific RR Co.	1/15/1976	8/09/1976 Dismissed	75-2112 (7th Cir., 1975)
7978	Chicago, Milwaukee, St. Paul & Pacific RR Co.	12/09/1975	8/09/1976 Dismissed	75-2112 (7th Cir., 1975)
11251	Chicago, Milwaukee, St. Paul & Pacific RR Co.	12/09/1975	8/09/1976 Dismissed	75-2112 (7th Cir., 1975)
6158	Clark, John T. & Son of Boston, Inc.	2/11/1976		__F.2d__ 76-1070 (1st. Cir., 1976)
4863	Clark, John T. & Son of Boston, Inc.	2/11/1976		76-1070 (1st Cir., 1976)
1515	Clarkson Contruction Co.	1/27/1975	1/21/1976 Affirmed	531 F.2d 451 (10th Cir., 1976)
2546	*Consolidated Freightways Corp.	1/08/1974	4/03/1974 Dismissed	74-1032 (7th Cir., 1974)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
2920	Continental Kitchens, Inc.	2/12/1976		76-1306 (9th Cir., 1976)
1829	*Continental Oil Co.	8/08/1975		__F.2d__ 75-1961 (6th CA)
1296	*Cooney, Don L., Inc. (John T. Dunlop, Secretary of Labor vs. Don L. Cooney, Inc.)	7/30/1973	3/14/1975 Affirmed	__F2d__ 73-2403 (9th CA)
6871	Costello, Bernard S., Inc.	2/11/1976		76-1070 (1st Cir., 1976)
2763	Cox Brothers, Inc.	8/19/1975		__F2d _ 75-2849 (9th CA)
1255	*Custom Painting Company	8/10/1973	11/09/1973 Dismissed	73-2500 (9th Cir., 1973)
2719	Dayton Tire & Rubber Co.	3/27/1975	6/10/1976 Affirmed	__F.2d__ 75-1316 (D.C. CA)
2477	Deering Milliken Co.	1/09/1974	9/20/1974 Dismissed	74-1046 (4th Cir., 1974)
11884	Desarollos Metropolitanos, Inc.	4/12/1976		76-1084 (1st Cir., 1976)

459	Diamond Roofing Co., Inc.	11/14/1973	3/15/1976 Reversed	528 F.2d 645(5th Cir., 1976)
6767	Diebold, Inc.	3/08/1976		76-1278 (6th Cir., 1976)
7721	Diebold, Inc.	3/08/1976		76-1278 (6th Cir., 1976)
9496	Diebold, Inc.	3/08/1976		76-1278(6th Cir., 1976)
4598	Dorey Electric Co.	10/29/1974		__F.2d__ 74-2181 (4th CA)
1589	*Echols, Bill Trucking Co. (Peter J. Brennan v. OSAHRC & Bill Echols Trucking Co.)	3/23/1973	11/13/1973 Remanded	487 F.2d 230 (5th. Cir., 1973)
11115	Empire-Detroit Steel Div., Detroit Steel Corp.	4/08/1976		76-1417 (6th Cir., 1976)
15123	Fattore Construction Co.	3/10/1976	6/04/1976 Dismissed	76-1229 (D.C. Cir., 1976)
4395	Federico, D. Co., Inc.	2/26/1976		76-1084 (1st Cir., 1976)
4155	Felton Construction Co. (Felton Constr. Co. v. OSAHRC)	6/05/1974	6/16/1975 Denied	518 F.2d 49 (9th Cir., 1975)
916	*Fiegen, Ron M., Inc. (Peter J. Brennan, Secretary of Labor vs. the OSAHRC and Ron M. Fiegen, Inc.)	9/03/1974	4/18/1975 Affirmed	513 F.2d 713 (8th Cir., 1975)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
5625	Fielderest Mills, Inc.	10/04/1974	10/07/1975 Dismissed	__F.2d__ 74-2107 (4th CA)
1734	*Flagg, C.N. & Co., Inc.	10/21/1974	1/12/1976 Denied	74-2362 (2nd Cir., 1976)
3710	*Franzen, Norman d/b/a Norm's Trailer Sales	8/05/1974	9/11/1974 Dismissed	74-1589 (8th Cir., 1974)
344	Friederich, A. & Sons Co.	9/03/1974	3/18/1975 Dismissed	__F.2d__ 74-2171 (2d CA)
890	Frohlick Crane Service, Inc.	8/16/1974	8/19/1975 Affirmed	521 F.2d 628 (10th Cir., 1975)
3203	GAF Corporation	1/13/1976		__F.2d__ 76-1028 (D.C. CA)
4008	GAF Corporation	1/13/1976		__F.2d__ 76-1028 (D.C. CA)
2028	Garland Call Pole Co.	7/07/1975	2/18/1976 Dismissed	__F.2d__ 75-1646 (D.C. Cir.)

4263	Gearhart-Ownes Ind., Inc.	4/21/1975	9/29/1975 Dismissed	__F.2d__ 75-1392 (D.C. Cir.)
2795	Gem Top Mfg., Inc.	5/27/1975		__F.2d__ 75-2160 (9th CA)
2739	General Electric Co.	6/20/1975	8/17/1976 Reversed	__F.2d__ 75-4116 (2nd CA)
190	*Gerosa, Inc. (Peter J. Brennan v. OSAHRC & Gerosa, Inc.)	3/22/1973	2/11/1974 Vacated	491 F.2d 1340 (2nd Cir., 1974)
2671	Getty Oil Co.	3/31/1975	4/23/1976 Affirmed	530 F.2d 1143 (5th Cir., 1976)
504	*Gilles & Cotting, Inc. (Peter J. Brennan v. Gilles & Cotting & OSAHRC)	12/16/1973	10/18/1974 Remanded	504 F.2d 1255 (4th Cir., 1974)
2537	Glen Construction Co., Inc.	1/07/1974	5/19/1976 Vacated	__F.2d__ 74-1031 (D.C.)
2038	Goodrich, B. F. Co. (The B. F. Goodrich Co. vs. OSAHRC)	7/24/1974	4/24/1975 Remanded	__F.2d__ 74-1836 (6th CA)
25	*Gordon, John J. Co. (Brennan v. OSAHRC & John J. Gordon Co.)	5/14/1973	2/25/1974 Remanded	492 F.2d 1027 (2nd Cir., 1974)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
7031	*Grand Union Co.	12/24/1975	8/16/1976 Dismissed	75-4283 (2nd Cir., 1975)
7533	*Grand Union Co.	12/24/1975	8/16/1976 Dismissed	75-4283 (2nd Cir., 1975)
2538	*Graven Brothers & Co.	5/27/1976		76-1481 (10th Cir., 1976)
112	*Gressani-Gysel Construction Inc.	9/28/1973	1/08/1974 Dismissed	73-2444 (2nd Cir., 1974)
3120	Greyhound Lines-West	7/23/1976		76-2608 (9th Cir., 1976)
722	Gurney Industries	6/29/1973	11/28/1973 Dismissed	73-1813 (4th Cir., 1973)
89	*Hanovia Lamp Div. Canrad Precision Industries, Inc. (Peter J. Brennan v. OSAHRC & Hanovia Lamp Div., Conrad Precision Indus.	2/13/1973	8/14/1974 Remanded	502 F.2d 946 (3rd. Cir., 1974)
141	*Hansen Logging Co.	12/14/1972	5/17/1973 Dismissed	72-3144 (9th Cir., 1973)
2200	*Harrison, B. W. Lumber Co.	6/14/1976		76-2619 (5th Cir., 1976)

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853	Hartwell Excavating Co.	11/26/1974	6/18/1976 Affirmed	537 F.2d 1071 (9th Cir., 1976)
1599	*Haybuster Manufacturing Co.	2/03/1975	10/20/1975 Remanded	524 F.2d 222 (8th Cir., 1975)
111	*Hecherman, B., Iron Works, Inc.	9/28/1973	12/17/1973 Dismissed	73-2445 (2nd Cir., 1973)
4137	Heldenfels Brothers Contractors (Heldenfels Brothers Contractors v. OSAHRC & Peter J. Brennan, Sec. of Labor)	6/26/1974	4/18/1975 Affirmed	__F.2d__ 74-2690 (5th CA)
1228	*Hendrix, Raymond d/b/a Alsea Lumber Co. (Peter J. Brennan, Secretary of Labor vs. OSAHRC and Raymond Hendrix d/b/a Alsea Lumber Company)	5/25/1973	2/24/1975 Affirmed	511 F.2d 1139 (9th Cir., 1975)
4678	*Hermitage Concrete Pipe Co.	3/17/1976		76-1316 (6th Cir., 1976)
644	Hoffman Construction Co.	3/27/1975		__F.2d__ 75-1741 (9th CA)
237	*Holliday, Ira, Logging Co.	6/26/1973	11/29/1973 Dismissed	73-2170 (9th Cir., 1973)

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OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
2862	Holt Marine Terminal, Inc.	6/06/1975	3/26/1976 Affirmed	__F.2d__ 75-1584 (3rd CA)
7175	Holt Marine Terminal, Inc.	3/01/1976	5/18/1976 Dismissed	75-2453 (3rd Cir., 1975)
1410	Hormel, George A. & Co.	11/18/1974	7/16/1975 Withdrawn	74-1882 (8th Cir., 1975)
1096	Horne Plumbing & Heating Co.	11/18/1974	2/26/1976 Vacated	528 F.2d 564 (5th Cir., 1976)
1261	Horne Plumbing & Heating Co.	11/18/1974	2/26/1976 Vacated	528 F.2d 564 (5th Cir., 1976)
7047	I.T.O. Corp. of Ameriport, Inc.	12/29/1975	5/18/1976 Dismissed	75-2453 (3rd Cir., 1975)
7281	I.T.O. Corp. of Ameriport, Inc.	3/01/1976	5/18/1976 Dismissed	75-2453 (3rd Cir., 1975)
4107	I.T.O. Corp. of England	2/11/1976		76-1070 (1st Cir., 1976)
4803	I.T.O. Corp. of England	2/11/1976		76-1070 (1st Cir., 1976)
6107	I.T.O. Corp. of England	2/11/1976		76-1070 (1st Cir., 1976)

4897	Independent Pier Co.	3/01/1976	5/18/1976 Dismissed	75-2453 (3rd Cir., 1975)
919	Intercounty Construction Co.	2/13/1974	7/24/1975 Denied	522 F.2d 777 (4th Cir., 1975)
779	*Interstate Glass Co. (Peter J. Brennan v. OSAHRC and Interstate Glass Co.)	1/08/1973	10/26/1973 Affirmed	487 F.2d 438 (8th Cir., 1973)
701	Irey, Frank Jr., Inc.		3/22/1976 Cert. Granted	96 S. Ct. 1458
701	Irey, Frank, Jr., Inc. (Frank Irey, Jr., Inc. V. OSAHRC and Peter J. Brennan)	9/07/1973	11/11/1974 Cert. Granted	519 F.2d 1200 (3rd Cir., 1974)
3116	Irvington Moore, Div. of U.S. Natural Resources, Inc.	5/27/1975		__F.2d__ 75-2159 (9th CA)
4734	J. W. Black Lumber Co.	1/06/1976	4/23/1976 Dismissed	__F.2d__ 76-1010 (8th CA)
2274	*Jamison Bedding, Inc.	8/18/1975	11/18/1975 Withdrawn	__F.2d__ 75-1987 (6th CA)
1689	*Keibler Industries, Inc.	9/24/1973	1/03/1974 Dismissed	73-1822 (3rd Cir., 1974)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
5958	*Kennecott Copper Corp.	8/13/1976		76-1735 (10th Cir., 1976)
306	*Kesler & Sons Construction Co. (Peter J. Brennan, Secretary of Labor vs. OSAHRC and Kesler & Sons Construction Company)	9/05/1974	3/28/1975 Remanded	513 F.2d 553 (10th Cir., 1975)
9760	Keystone Roofing Co., Inc.	9/03/1975	7/23/1976 Affirmed	__F.2d__ 75-2010 (3rd CA)
9438	Kimball International, Inc.	6/07/1976		76-1542 (7th Cir., 1976)
15109	Kinney Systems, Inc.	5/10/1976	6/14/1976 Dismissed	76-4119 (2nd Cir., 1976)
3701	*Lacy, Franklin R. d/b/a Aqua View Apts.	6/01/1976		__F.2d__ 76-2201 (9th CA)
801	Lake Butler Apparel Co. (Lake Butler Apparel Co. V. Sec. of Labor)	1/24/1973	9/15/1975 Affirmed	519 F.2d 84 (5th Cir., 1975)
1102	Lance Roofing Co.	2/13/1974	3/15/1976 Reversed	528 F.2d 645 (5th Cir., 1976)

1536	Langer Roofing and Sheet Metal Inc.	3/06/1975	11/20/1975 Reversed	524 F.2d 1337 (7th Cir., 1975)
1208	Langer Roofing and Sheet Metal, Inc.	8/12/1974	11/20/1975 Reversed	524 F.2d 1337 (7th Cir., 1975)
383	*Laznski, W.S., Inc.	6/25/1973	10/16/1973 Withdrawn	73-1559 (7th Cir., 1973)
1105	Lee Way Motor Freight, Inc. (Lee Way Motor Freight, Inc. vs. Secretary of Labor)	5/22/1974	2/19/1975 Affirmed	511 F.2d 864 74-1236 (10th CA)
4090	Leone Construction Co.	3/08/1976	5/17/1976 Withdrawn	76-4070 (2nd Cir., 1976)
2455	Les Mares Enterprises, Inc.	6/02/1975	8/16/1976 Reversed	__F.2d__ 75-2196 (9th CA)
4553	Lockrem, Lloyd C., Inc.	3/26/1976	9/13/1976 Dismissed	76-1670 (9th Cir., 1976)
9994	Long Manufacturing Co. I.C., Inc.	6/23/1976		76-1518 (8th Cir., 1976)
285	Mabry, J.L., Grading, Inc.	6/04/1973	9/04/1973 Dismissed	73-2248 (5th Cir., 1973)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
9	Madden, Dale M. Const., Inc. (Dale M. Madden Const., Inc. v. James D. Hodgson)	5/15/1972	7/29/1974 Dismissed	502 F.2d 278 (9th Cir., 1974)
1363	*Maes, Manuel Const. Co., Inc. (Brennan v. OSAHRC & Manuel Maes Const. Co., Inc.)	6/27/1973	3/28/1974 Affirmed	73-1464 (10th Cir., 1974)
4725	*Marquette Cement Mfg. Co.	3/24/1976		76-4083 (2nd Cir., 1976)
6565	McCarthy, J. A., Inc.	3/05/1976	5/14/1976 Dismissed	76-1262 (3rd Cir., 1976)
7177	McCarthy, J. A., Inc.	3/05/1976	5/14/1976 Dismissed	76-1262 (3rd Cir., 1976)
7522	McCarthy, J. A., Inc.	3/05/1976	5/14/1976 Dismissed	76-1262 (3rd Cir., 1976)
2847	McLean Trucking Co. (McLean Trucking Co. v. OSAHRC & Sec. of Labor)	11/20/1973	9/04/1974 Denied	503 F. 2d 8 (4th Cir., 1974)
4079	Merit Construction Co.	9/08/1975		__F.2d__ 75-2996 (9th CA)

3860	Messina, F. X. Const. Corp. (F.X. Messina Const. Corp. v. OSAHRC and Peter J. Brennan)	6/20/1974	11/07/1974 Affirmed	505 F.2d 701 (1st Cir., 1974)
8845	Mohawk Excavating, Inc.	3/03/1976		76-4068 (2nd Cir., 1976)
364	Mullins, S.D., Co., Inc.	11/14/1973	3/15/1976 Reversed	528 F.2d 645 (5th Cir., 1976)
1588	*Mushroom Transportation Co.	1/02/1974	4/17/1974 Dismissed	74-1014 (3rd Cir., 1974)
12460	*Nabisco, Inc.	11/03/1975	2/18/1976 Dismissed	__F.2d__ 75-3923 (5th CA)
2998	Nacirema Operating Co. Inc.	6/06/1975	3/26/1976 Affirmed	__F.2d__ 75-1584 (3rd CA)
2030	*Nager Electric Co., Inc.	4/06/1973	4/01/1974 Dismissed	73-1506 (2nd Cir., 1973)
673	Nasso, Julius, Concrete Co.	9/30/1974	11/27/1974 Dismissed	__F.2d__ 74-2273 (2d CA)
85	National Reality & Const. Co., Inc. (National Reality & Const. Co., Inc. v. OSAHRC & Peter J. Brennan)	10/17/1972	12/13/1973 Reversed	489 F.2d 1257 (D.C. Cir., 1973)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
4309	*Nelson, Donald K. Const. Co.	2/23/1976	8/05/1976 Dismissed	76-1112 (10th Cir., 1976)
3367	Noblecraft Industries, Inc.	1/09/1976		__F.2d__ 76-1106 (9th CA)
3710	*Norm's Trailer Sales (See Franzen, Norman)			
5811	Ocean Electric Co.	1/16/1976		76-1060 (4th Cir., 1976)
4459	Olin Constr. Co., Inc.	11/21/1974	9/09/1975 Affirmed	525 F.2d 464 (2nd Cir., 1976)
3486	Olin Construction Company	9/23/1975	4/05/1976 Denied	__F.2d__ 75-4204 (2nd CA)
1468	*Otinger, S.J., Jr., Const. Co. (Peter J. Brennan v. OSAHRC & S.J. Otinger, Jr., Const. Co.	8/29/1973	10/03/1974 Reversed	502 F.2d 30 (5th Cir., 1974)
3443	*P & M Sales, Inc.	7/07/1976	8/11/1976 Dismissed	76-4166 (2nd Cir., 1976)
13562	*PPG Industries, Inc.	3/17/1976		76-1123 (D.C. Cir., 1976)

2821	Pacific Gas & Electric Co.	5/19/1975		__F.2d__ 75-2095 (9th CA)
5056	*Pan American World Airways	7/02/1976		76-4159 (2nd Cir., 1976)
2987	*Paper Products Co., Inc.	9/21/1974	2/03/1975 Dismissed	74-1956 (3rd Cir., 1974)
5796	Penn Central Transportation Co.	2/20/1976	6/09/1976 Dismissed	76-1176 (D.C. Cir., 1976)
738	Penn Central Transportation Co.	1/28/1975		__F.2d__ 75-1102 (4th CA)
3162	Penn-Dixie Steel Corp. (Formerly Continental Steel Corp.)	9/08/1975		__F.2d__ 75-1819 (7th CA)
3069	Pike, Floyd S. Electrical	3/24/1975		__F.2d__ 75-1314 (4th CA)
2459	*Priest, Milton W., d/b/a Wasatch Roofing Co.	1/14/1974	4/02/1974 Dismissed	74-1001 (10th Cir., 1974)
963	Probst, J.F. and Co., Inc.	10/11/1974		__F.2d__ 74-1826 (7th CA)
28	REA Express, Inc. (REA Express, Inc. v. Peter J. Brennan & OSAHRC)	3/30/1973	4/18/1974 Denied	495 F.2d 822 (2nd Cir., 1974)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
22	*Republic Creosoting Co. (Div. of Reilly Tar & Chem. Corp.) (Peter J. Brennan v. OSAHRC & Republic Creosoting Co., Div. of Reilly Tar & Chem. Corp.)	4/04/1973	8/16/1974 Affirmed	501 F.2d 1196 (7th Cir., 1974)
3028	Ringland - Johnson, Inc.	8/12/1976		76-1687 (8th Cir., 1976)
2692	Rockwell International (formerly N/A Rockwell Corp.)	6/12/1975	8/26/1976 Remanded	__F.2d__ 75-1672 (6th CA)
2875	Rockwell International (formerly N/A Rockwell Corp.)	6/12/1975	8/26/1976 Remanded	__F.2d__ 75-1672 (6th CA)
2617	Rogers, George W. Const. Corp. (George W. Rogers Const. Corp. v. Peter J. Brennan)	1/23/1974	6/26/1974 Denied	498 F.2d 1396 (2d Cir., 1974)
2096	Roth Steel Tube Co. (Roth Steel Tube Co. v. OSAHRC et al)	11/30/1973	4/19/1974 Affirmed	495 F.2d 1373 (6th Cir., 1974)
391	Ryder Truck Lines, Inc. (Ryder Truck Lines, Inc. v. Peter J. Brennan)	10/04/1973	7/18/1974 Denied	497 F.2d 230 (5th Cir., 1974)

1740	*San Jose Crane & Rigging, Inc.	8/30/1973	1/03/1974 Dismissed	73-2662 (9th Cir., 1973)
331	*Santa Fe Trail Transport Co. (Peter J. Brennan v. OSAHRC & Sante Fe Trail Transport Co.)	2/14/1974	10/23/1974 Reversed	505 F.2d 869 74-1049 (10th CA)
12067	Savina Home Ind. Inc.	6/03/1976	7/08/1976 Dismissed	76-1513 (10th Cir., 1976)
2802	Seaboard Coast Line Railroad Co.	11/29/1974		__F.2d__ 74-3984 (5th CA)
10541	Seaboard Coast Line Railroad Co.	1/21/1976	3/15/1973 Dismissed	__F.2d__76-1058 (D.C. CA)
11237	Seaboard Coast Line Railroad Co. and Winston-Salem Southbound Railway Co.	12/22/1975		75-2244 (D.C. Cir., 1975)
11904	Seaboard Coast Line Railroad Co. and Winston-Salem Southbound Railway Co.	12/22/1975		75-2244 (D.C. Cir., 1975)
10732	Seaboard Coast Line Railroad Co.	1/21/1976	3/15/1976 Dismissed	__F.2d__ 76-1059 (D.C. CA)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
3324	Shaw Construction, Inc.	9/18/1975	7/12/1976 Aff.-Pt/Rev.-Pt./Remanded	534 F.2d 1183 (5th Cir., 1976)
4298	Sheehan, Dan J. Co.	7/05/1974	10/08/1975 Affirmed	520 F.2d 1036 (5th Cir., 1975)
4298	Sheehan, Dan J. Co.		3/22/1976 Cert. Denied	96 S. Ct. 1458
3527	Signode Corp.	5/14/1976		76-1456 (7th Cir., 1976)
4078	Sinapp Co.-Staten Island	12/24/1975	2/11/1976 Dismissed	75-4284 (2nd Cir., 1975)
995	*Smoke Craft, Inc.	7/18/1974	2/13/1976 Reversed	530 F.2d 843 (9th Cir., 1976)
1445	Southeast Contractors, Inc. (Southeast Contractors, Inc. vs. John T. Dunlop, Secretary of Labor)	6/27/1974	3/19/1975 Reversed	512 F.2d 675 (5th Cir., 1975)
1492	*Southern Contractors Service (Peter J. Brennan v. Southern Contractors Service and OSAHRC)	7/19/1973	4/12/1974 Affirmed	492 F.2d 498 (5th Cir., 1974)

1348	*Southern Pacific Trans. Co.	11/29/1974		__F.2d__ 74-3981 (5th CA)
1348	Southern Pacific Transportation Co.	1/10/1975		__F.2d__ 75-1091 (5th CA)
10332	Southern Pacific Transportation Co.	12/15/1975		75-4331 (5th Cir., 1975)
5566	Southern Railway Co.	1/15/1975	2/09/1976 Affirmed	__F.2d__ 75-1055 (4th CA)
5566	Southern Railway Co.		7/23/1976 Pet. for Cert. Filed	76-100 (45 LW 3101)
5960	Southern Railway Co.	12/19/1975	6/04/1976 Withdrawn	75-2493 (6th Cir., 1975)
6526	State Sheet Metal & Roofing	4/02/1975	9/15/1976 Vacated	__F.2d__ 75-1355 (6th CA)
6316	Stockwell Mfg. Co.	6/19/1975	5/18/1976 Denied & Dismissed	536 F.2d 1306 (10th Cir., 1976)
4498	Structural Systems, Inc.	8/12/1974		__F.2d__ 74-2520 (9th CA)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
33	Swatek, M. A., and Company	6/25/1973	9/28/1973 Dismissed	73-1445 (10th Cir., 1973)
9998	Sweeney, Harold E. Corp.	9/03/1975	7/23/1976 Affirmed	__F.2d__ 75-2010 (3rd CA)
4882	Terminal Services, Inc.	2/11/1976		76-1070 (1st Cir., 1976)
5579	Terminal Services, Inc.	2/11/1976		76-1070 (1st Cir., 1976)
6159	Terminal Services, Inc.	2/11/1976		76-1070 (1st Cir., 1976)
11903	Texaco, Inc.	4/19/1976	7/13/1976 Dismissed	76-1318 (10th Cir., 1973)
18	Texports Stevedore Co., Inc. (Texports Stevedore Co., Inc. v. Sec. of Labor and OSAHRC)	3/16/1973	9/20/1973 Denied	484 F.2d 465 (5th Cir., 1973)
370	*Thorleif Larsen & Sons, Inc.	3/08/1973	1/22/1974 Dismissed	73-1232 (7th Cir., 1973)
11166	Titanium Metals Corp. of America	12/12/1975		75-3724 (9th Cir., 1975)
11515	Titanium Metals Corp. of America	12/12/1975		75-3724 (9th Cir., 1975)

1556	Todd Shipyards Corp.	4/22/1975		__F.2d__ 75-1909 (9th CA)
12510	Todd Shipyards Corp.	3/17/1976		76-1336 (9th Cir., 1976)
687	Transcon Lines (Transcon Lines vs. OSAHRC)	7/01/1974	4/16/1975 Affirmed (not published)	76-1413 (10th CA)
155	*U.S. Pipe & Foundry Co.	2/23/1973	5/04/1973 Dismissed	73-1176 (6th Cir., 1973)
2081	*Underhill Const. Corp. & Dic Concrete Corp. (Peter J. Brennan Sec. of Labor vs. OSAHRC & Underhill Construction Corp.)	5/02/1974	3/10/1975 Denied	513 F.2d 1032 (2nd Cir., 1975)
2081	Underhill Const. Corp. & Dic Concrete Corp. (Underhill Construction Corp. & Dic. Concrete Corp. vs. Peter J. Brennan, Sec. of Labor & OSAHRC)	5/02/1974	3/10/1975 Denied	513 F.2d 1032 (2nd Cir., 1975)
1307	Underhill Construction Co.	3/27/1975	11/24/1975 Denied	526 F.2d 53 (2nd Cir., 1975)
4247	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
4484	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
4504	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
4639	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
4641	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
4643	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
4667	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
4676	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
4716	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)

4907	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
4908	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
5075	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
5197	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
5779	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
5795	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
6320	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
6368	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
1697	Union Pacific Railroad Co.	1/27/1975	transferred to 5th Cir.; see below	__F.2d__ 75-1065 (8th CA)
1697	Union Pacific Railroad Company			75-1613 (5th Cir., 1976)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
4318	Union Railroad Co.	1/06/1975	5/16/1975 Dismissed	__F.2d__ 75-1013 (3d CA)
2786	United Auto Workers, Local 588	7/23/1976		76-1718 (7th Cir., 1976)
2414	United Engineers & Constructors, Inc.	8/18/1975	9/17/1975 Dismissed	__F.2d__ 75-1946 (3rd CA)
7355	United Engineers & Constructors, Inc.	1/15/1976		76-1041 (3rd Cir., 1976)
7355	United Engineers & Constructors, Inc.	1/15/1976		__F.2d__ 76-1041 (3rd CA)
6364	United Parcel Service Inc.	9/08/1976		76-2030 (6th Cir., 1976)
6344	United Parcel Service, Inc.	8/05/1976		76-2030 (6th Cir., 1976)
2975	United States Steel Corp.	1/10/1975	6/23/1975 Dismissed	517 F.2d 1400 (3rd Cir., 1975)
3010	United States Steel Corp.	9/24/1975	6/30/1976 Denied	537 F.2d 780 (3rd Cir., 1976)
4349	United States Steel Corp.	1/10/1975	6/23/1975 Dismissed	517 F.2d 1400 (3rd Cir., 1975)

4684	United States Steel Corp.	1/10/1975	6/23/1975 Dismissed	517 F.2d 1400 (3rd Cir., 1975)
1607	*Verne-Woodrow Co. (James D. Hodgson v. The Verne-Woodrow Co.)	9/07/1973	5/28/1974 Remanded	494 F.2d 1181 73-3134 (5th CA)
31	*Vy Lactos Laboratories, Inc. (Peter J. Brennan v. OSAHRC Vy Lactos Laboratories, Inc.)	4/12/1973	4/05/1974 Remanded	494 F.2d 460 (8th Cir., 1974)
4044	Wallace Roofing Co., Inc.	6/13/1974	8/30/1976 Reversed	__F.2d__ 74-2580 (5th CA)
2459	*Wasatch Roofing Co. (See Priest, Milton W.)			
3064	Water Tunnel Contractors	7/24/1975	1/16/1976 Withdrawn	__F.2d__ 75-4152 (2nd CA)
16109	Western Motors of North Plate, Inc.	9/07/1976		76-1773 (8th Cir., 1976)
3528	Western Steel Mfg. Co.	6/04/1976		76-2224 (9th Cir., 1976)
1087	*Western Waterproofing Co., Inc.	8/18/1976		76-1703 (8th Cir., 1976)
1191	*Weyerhaeuser Company	9/17/1973	12/04/1973 Dismissed	73-2779 (9th Cir., 1973)
1320	White Oak Corp. (White Oak Corp. vs. Secretary of Labor)	9/16/1974	5/14/1975	__F.2d__ 74-2232 (2d CA)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
3387	Workinger Elec., Inc.	5/13/1974	5/27/1975 Reversed	516 F.2d 1081 (7th Cir., 1975)
2658	Yellow Freight System, Inc.	5/14/1975	2/20/1976 Affirmed (not to be published)	75-1483 (D.C. Cir., 1976)
2658	Yellow Freight System, Inc.		5/20/1976 Pet. for Cert. Filed	75-1683 (44 LW 3703)
245	*York Metal Finishing Co.	6/06/1974	9/09/1974 Dismissed	74-1554 (3rd Cir., 1974)
756	Zaich, Matt J. Const. Co.	6/04/1973	Dismissed	73-1995 (9th Cir., 1973)

APPENDIX B

TABLE 19

CIVIL CASES PENDING JUNE 30, BY NATURE OF SUIT FISCAL YEARS 1968-1976

Nature of suit	Fiscal Years									Percent change 1976 over 1975
	1968	1969	1970	1971	1972	1973	1974	1975	1976	
Total	**82,482**	**86,321**	**93,207**	**100,040**	**101,032**	**101,333**	**107,230**	**119,767**	**140,189**	**17.1**
United States Cases	17,989	19,267	20,465	20,692	21,305	21,442	22,325	26,155	34,288	31.1
Contract	2,697	3,053	3,462	3,278	3,525	3,067	2,491	2,415	2,524	4.5
Land condemnation	2,138	2,253	2,112	2,075	1,777	1,774	1,761	2,136	3,299	54.4
Other real property	979	956	902	943	1,190	1,311	1,652	1,916	2,362	23.3
Tort Actions	3,495	3,335	3,116	2,929	2,572	2,422	2,524	2,773	2,963	6.9
Antitrust	74	86	84	91	117	111	96	113	109	−3.5
Prisoner petitions:										
Motions to vacate sentence	345	538	616	519	553	592	614	654	615	−6.0
Habeas corpus	184	305	396	424	372	353	422	386	426	10.4

TABLE 19

CIVIL CASES PENDING JUNE 30, BY NATURE OF SUIT
FISCAL YEARS 1968-1976–Continued

Nature of suit	Fiscal Years									Percent change 1976 over 1975
	1968	1969	1970	1971	1972	1973	1974	1975	1976	
Prisoner petitions:–Continued										
Civil Rights	18	34	73	96	120	188	203	250	255	2.0
Mandamus, other	168	221	235	268	325	415	351	463	250	–24.4
Forfeiture and penalties	1,158	919	1,040	1,334	1,526	1,679	1,291	1,481	1,692	14.2
Labor suits	1,250	1,244	1,344	1,489	1,474	1,350	1,477	1,457	1,739	19.4
Tax suits	2,990	2,690	2,655	2,519	2,301	2,249	2,415	2,327	2,504	7.6
Social Security laws	1,147	1,585	1,935	2,160	2,577	2,595	3,397	5,595	10,122	80.9
Narcotic Addict Rehabilitation Act	179	451	554	519	522	368	207	82	57	–30.5
Civil Rights	172	289	388	532	620	884	1,139	1,443	1,946	34.9
All other U.S. cases	995	1,308	1,553	1,516	1,734	2,084	2,285	2,664	3,325	24.8
Private Cases	64,493	67,054	72,742	79,348	79,727	79,891	84,905	93,612	105,901	13.1
Contract	15,655	15,894	17,385	19,293	19,079	18,482	18,973	21,109	23,678	12.2
Real property	1,581	1,457	1,569	1,720	1,421	1,402	1,538	1,765	1,835	4.0
Federal Employers' Liability Act	1,838	2,022	2,090	2,107	1,872	1,605	1,525	1,544	1,677	8.6
Motor vehicle personal injury	11,828	11,592	11,191	10,311	8,762	7,758	7,421	6,812	6,438	–5.5
Marine personal injury	10,552	10,486	10,300	10,436	9,413	7,659	6,794	6,602	6,727	1.9
Other personal injury	7,022	7,301	7,752	8,136	8,121	7,961	8,074	8,908	10,248	15.0
Other tort actions	1,894	1,933	2,089	2,331	2,323	2,540	3,408	4,050	4,750	17.3
Antitrust	1,360	1,623	1,933	2,213	2,563	2,734	2,492	2,526	2,778	10.0
Prisoner petitions:										
Habeas corpus	2,075	2,512	3,043	3,370	3,133	2,978	3,142	3,281	3,715	13.2
Civil Rights	561	772	1,281	1,933	2,403	3,069	4,146	5,241	6,341	21.0
Mandamus and other	268	294	289	390	388	317	273	194	150	–22.7
Copyright, patent and trademark	2,497	2,551	2,742	2,799	2,739	2,634	2,573	2,609	2,861	9.7
Labor suits	1,966	1,961	2,126	2,543	2,609	2,810	3,256	4,292	5,469	27.4
Securities, commodities and exchanges	1,184	1,416	1,925	2,893	3,334	3,489	3,825	4,047	4,166	2.9
Civil Rights	1,652	2,357	3,616	4,639	5,661	6,785	8,159	10,400	12,911	24.1
Interstate Commerce	656	750	1,056	1,759	3,235	4,766	6,285	7,261	8,743	20.4
All other	1,904	2,133	2,355	2,475	2,671	2,902	3,021	2,971	3,414	14.9

NOTE: This table summarizes pending civil cases by nature of suit appearing in Table C-3a in the appendix with more detail being provided for the "all other" class.

SOURCE – 1976 Annual Report of the Director's Administrative Office of the United States Courts, p. 86.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

Supreme Court, U. S.
FILED
JUN 19 1976
MICHAEL RODAK, JR., CLERK

No. 75-748

FRANK IREY, JR., INC.,

Petitioner,

vs.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.,

Respondents.

No. 75-746

ATLAS ROOFING COMPANY, INC.,

Petitioner,

vs.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

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IN THE

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OCTOBER TERM, 1975.

No. 75-748.

FRANK IREY, JR., INC.,

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

INTEREST OF THE AMICUS*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000) and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to the Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant employment-related matters before the Court. *E.g.*, *Connell Constr. Co.* v. *Plumbers, Local 100*, 421 U. S. 616 (1975); *William E. Arnold Co.* v. *Carpenters*, 417 U. S. 12 (1974); *Super Tire Engin. Co.* v. *McCorkle*, 416 U. S. 115 (1974); *Boys Markets* v. *Retail Clerks*, 398 U. S. 235 (1970); *Porter Co.* v. *NLRB*, 397 U. S. 99 (1970).

The issue presented in these cases, whether the seventh amendment of the United States Constitution compels that employers be accorded the right to a jury trial in civil penalty proceedings under the Occupational Safety and Health Act of 1970 (OSHA), 29 U. S. C. §§ 651 *et seq.*, is a question of vital concern to the Chamber's members. Unlike more common statutory schemes where civil penalty actions for violations of an agency's regulations are brought in federal district court and the right to jury trial is guaranteed, the novel procedures for the enforcement of OSHA subject employers to substantial civil penalties before an administrative tribunal, without benefit

* Pursuant to Rule 42(2) of the Rules of this Court, the *amicus* has obtained written consents to the filing of this brief from the Petitioners and the Solicitor General on behalf of the Respondents. These consents have been filed with the Clerk of the Court.

of the right to *de novo* jury trial at any stage of the proceeding. Further, as will be discussed hereinafter, OSHA contains procedures which permit the Secretary of Labor, in his unfettered discretion, to effectively foreclose even administrative consideration of the merits of an OSHA citation, thus, totally abrogating any semblance of an employer's right to due process of law. Since the majority of the Chamber's members are small businessmen and not large employers with vast resources to contest a citation in the face of the coercive OSHA enforcement procedures, they are in large measure effectively precluded from challenging OSHA citations. The Chamber believes that the OSHA civil penalty procedures improperly deny its members and all employers the fundamental right to jury trial guaranteed by the seventh amendment.

Moreover, since the novel civil penalty procedure contained in OSHA has been suggested as a blueprint for the revision of present legislation as well as a model for the future, the Chamber is particularly concerned that a denial of the fundamental right to a jury trial at issue under the Act here under consideration may well lead to a proliferation of similarly designed enactments to the detriment of the purpose and content of the Seventh Amendment. Because of the broad membership interests represented by the Chamber, it is in a position to bring considerations concerning this important issue to the Court's attention, which might not otherwise be advanced by the particular parties to this litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT.

The issue presented in these cases is whether the OSHA civil penalty procedure impermissibly deprives employers the right to jury trial guaranteed by the seventh amendment. This issue, however, is broader than OSHA itself and has far reaching significance since the OSHA procedure has been suggested as a blueprint for the revision of present as well as future Congressional legislation.[1] Thus the issue surrounding the novel enforcement procedure of the Act[2] raises a fundamental question for the future of our Constitutional form of government: To what extent, if at all, may Congress create statutory proceedings to adjudicate rights and deny a jury where, had that action existed at common law, a jury trial would have been guaranteed.

Under the OSHA civil penalty procedure involved here, an employer may be cited for a violation of the agency's regulations,[3] be penalized for such violation, and under threat of accumulating daily penalties, be required to abate or correct the alleged violation within a specified period of time set forth in the citation.[4] An employer then has fifteen (15) days within

1. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 900-901 (1972).

2. *Lance Roofing Company, Inc., et al.* v. *Hodgson*, 343 F. Supp. 685 (N. D. Ga. 1972), *aff'd.*, 409 U. S. 1070 (1972); Opinion of the Fifth Circuit below in No. 75-748, App. to Petition for Writ of Certiorari at 6a. As pointed out in the Petition for Writ of Certiorari at 9, of some 90 civil penalty provisions contained in the U. S. Code, only five (5), including OSHA, assigned to the agency the authority to impose a fine without *de novo* review in the courts.

3. OSHA § 9, 29 U. S. C. § 658.

4. OSHA § 10(a), 29 U. S. C. § 659(a). Section 17, 29 U. S. C. § 666 provides for a penalty of up to $10,000 for a willful violation,

(Continued on next page)

which to contest the citation. The Act provides that an employer wishing to contest a citation or penalty will be afforded an administrative hearing before a hearing examiner of the Occupational Safety and Health Review Commission (OSAHRC).[5] The three-member Commission has discretionary review power to consider appeals from decisions of the hearing examiner.[6] A decision by the Commission, or by the hearing examiner, if the Commission denies or fails to act on a petition for review, may be appealed to the appropriate federal circuit court of appeals or the Court of Appeals for the District of Columbia, where the Commission's or hearing examiner's findings of fact are conclusive and reviewable only under the substantial evidence standard.[7] The penalties assessed under this procedure are payable to the treasury of the United States.[8] At no point in this civil penalty procedure is an employer accorded a *de novo* factual review by a jury on the merits of the citation or penalty.[9]

Moreover, even the foregoing administrative proceeding is illusory. Under the Act the Secretary of Labor or his designee

(Continued from preceding page)

§ 17(a); a mandatory penalty of up to $1,000 for a "serious" violation, § 17(b); a penalty of up to $1,000 for a "nonserious" violation, § 17(c); and a penalty of up to $1,000 a day for every day of non-abatement after the abatement period specified in the citation has run, § 17(d).

5. OSHA § 10(c), 29 U. S. C. § 659(c).

6. Unless a member of the Commission decides to grant review, the order of the hearing examiner becomes final 30 days after issuance, with the silence of the Commission constituting a denial of the petition for review. 29 CFR § 2200.91(d) (1974).

7. OSHA § 11(a), 29 U. S. C. § 660(a).

8. OSHA § 17(1), 29 U. S. C. § 666(l).

9. While civil penalties adjudged to be due after the appeal process has terminated may be recovered by the Secretary of Labor in district court, no review of the merits is permitted. OSHA § 10(a), *supra*, provides that citations and proposed penalties are self-executing if not contested within fifteen (15) days and are not reviewable by any court or agency. See, *United States* v. *J. M. Rosa Construction Co.*, 1 OSHA 1188 (D. Conn. 1973).

in the field has the unfettered authority to coerce an employer to forego even the administrative and limited judicial review available to him. Thus, while the Act provides for an automatic stay of the abatement period pending the final order of the Commission, the abatement period is considered as having begun when the citation was issued if the Secretary or his designee decides that the employer is contesting only the amount of the penalty,[10] or is seeking review without good faith or solely for delay or avoidance of penalties.[11] By denying a stay, and bringing to bear the daily non-abatement penalties, the Secretary or his designee can transform a $1,000 penalty into a $100,000 penalty, should an employer choose to contest a citation through the OSHA procedure.[12] The threat of such penalties may force an employer to forego any appellate opportunities and proceed to immediately abate the alleged violation. Where abatement costs are significant, and an employer might wish to contest the citation, practical realities may inhibit his doing so. Faced with the "chilling factor" of continuing daily penalties, the employer would be coerced into incurring abatement costs, appeal would be futile, and, thus, administrative review of the merits of the citation foreclosed.[13]

The *amicus* contends and will demonstrate that the foregoing procedure impermissibly denies employers the right to jury trial guaranteed in the seventh amendment. Under traditional seventh amendment analysis, whether or not the right to jury trial

10. COMPLIANCE OPERATIONS MANUAL pt. XI-6, (Jan. 1972), Office of Compliance, Occupational Safety and Health Administration, Department of Labor.

11. OSHA § 10(b), 29 U. S. C. § 660(b).

12. See *Lance Roofing Company* v. *Hodgson, supra,* where the court observed the average time to obtain a decision from the Commission is 198 days.

13. See Note, *Due Process and Employee Safety: Conflict in OSHA Enforcement Procedures,* 84 Yale L. J. 1380, 1381-1388 (1975) wherein, apart from any seventh amendment consideration, it is suggested that such coerced abatement in and of itself denies an employer due process of law.

extends to statutory actions depends upon whether the statute creates rights and remedies which historically would have been considered actions at law rather than in equity or admiralty. In applying this test, this Court has sought to find an historical analog to the statutory action in question. Here, OSHA creates a right in the United States Government to command adherence to the Act through the enforcement of civil penalties. Under traditional seventh amendment analysis, such actions were considered to be common law actions of debt, carrying with them the right to jury trial.

The fact that Congress has committed the enforcement of OSHA to an administrative proceeding rather than to trial in the district courts, does not alter this conclusion. Where legal as opposed to equitable rights are concerned, Congress can not nullify the right to a jury trial in a proceeding before a court created under Article III of the Constitution, nor can it erode that right simply by substituting an administrative proceeding for a court proceeding. Further, since occupational health and safety is not a concern expressly delegated to Congress by the Constitution nor an area over which Congress has exclusive control, the traditional deference accorded Congressional determinations to administratively enforce its will in such areas is lacking here.

It is the *amicus'* view that since, under traditional analysis, employers have a seventh amendment right to a jury trial when charged with a violation of OSHA, the Court need not weigh that right against any asserted policy considerations which in this context would nullify the right under the seventh amendment. In this respect, the *amicus* agrees with Judge Gibbons who, in his dissent below, was of the view that the preservation of constitutional government outweighs any policy considerations which favor rejection of the right to a jury trial under OSHA. Nonetheless, the *amicus* believes that even if the Court were to apply a less traditional mode of seventh amendment

analysis and balance the seventh amendment right against the asserted reasons for finding the right to a jury trial inappropriate under OSHA, that balance here must be struck in favor of permitting the right to *de novo* jury review upon completion of the administrative procedure.

I.

TRADITIONAL SEVENTH AMENDMENT ANALYSIS COMMANDS THAT THE RIGHT TO TRIAL BY JURY BE AFFORDED EMPLOYERS IN CIVIL PENALTY PROCEEDINGS UNDER OSHA.

A. The Right to Jury Trial Extends to Statutes Which Create Rights and Remedies of the Sort Traditionally Enforced in Actions at Law.

The roots of the seventh amendment are deeply embedded in Constitutional history. Indeed, the amendment was proposed on the day following the enactment of the First Judiciary Act of 1789 which had preserved the right to jury trial as at common law for fear that, although that Act was presently satisfactory, Congress in the future could modify the right or take it away.[14] Thus, while the seventh amendment on its face applies only to "suits at common law,"[15] this Court has preserved that guarantee, repeatedly holding that the right to jury trial extends to statutes which, although not in existence in 1791, create rights and remedies that historically would have been treated as legal rather than equitable.[16] In applying this test, the Court

14. See, *Galloway* v. *United States*, 319 U. S. 372, 297-398 (1943) (Justice Black's dissenting opinion); 5 J. Moore, FEDERAL PRACTICE, ¶ 38.08[5], at 68-73 (2 ed. 1976).

15. U. S. Const. amend. VII provides: "In suits at common law . . . the right of jury trial shall be preserved. . . ."

16. *E.g. Parsons* v. *Bedford*, 28 U. S. (3 Pet.) 433 (1830); *Fleitmann* v. *Welsbach Co.*, 240 U. S. 27 (1916); *Curtis* v. *Loether*, 415 U. S. 189 (1974); *Pernell* v. *Southall Realty*, 416 U. S. 363 (1974).

has sought to find an historical analog which involved rights and remedies like those created by the statute at issue.[17] Thus, consistent with traditional seventh amendment analysis, the question to be resolved here is whether, historically, an action to adjudicate the rights and remedies like those created by OSHA would have been deemed "legal". As will be demonstrated, courts have historically considered similar proceedings to be "suits at common law" carrying with them the right to jury trial.

B. OSHA Creates A Statutory Right in the Government to Recover a Civil Penalty, An Action Which at Common Law Required Trial by Jury.

Under OSHA, Congress has granted the executive branch of the Government the right to enforce occupational safety and ealth regulations by levying civil penalties against those who violate those regulations. This Court long ago recognized that actions for statutory penalties embraced the common law form of action of debt which carried with it the right to a jury trial.[18] Indeed, it has been observed that proceedings to recover statutory penalties were considered common law actions of debt in England prior to the enactment of the Constitution and were considered to be "legal" actions during the early days of the republic. Thus, in *United States* v. *Jepson et al.*, 90 F. Supp. 983 (D. N. J. 1950) the Government brought an action under that section of the Emergency Price Control Act of 1942[19] which provided for the Government's recovery of a penalty in treble the amount of an overcharge in violation of that Act. The Government contended that the action was of statutory origin and an emergency right created by Congress and that, accordingly, the seventh amendment did not apply. The court

17. See *e.g., Pernell* v. *Southall Realty, supra.*

18. *Hepner* v. *United States*, 213 U. S. 103 (1908); *United States* v. *Regan*, 232 U. S. 40 (1914).

19. 56 Stat. 23, 50 U. S. C. App. § 901 *et seq.*

engaged in the traditional seventh amendment and concluded thusly:

> "Long prior to our independence there had grown up under original writs certain well-defined actions at common law, among them, the action of debt covering, among other causes, suits for statutory penalties and qui tam actions. See, Chitty on Pleading, Seventh American Edition, page 126. That such an action was recognized as a suit at common law in this country, in the year 1795, is made sparklingly clear in U.S. v. Mundell, 27 Fed. Cas. 23, No. 15-834.
>
> * * * * *
>
> It is my thought that when a federal statute embraces a common-law form of action, that action does not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in an ac for debt still prevails whatever modern name may be applied to the action. To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments. It is by such methods that courts lose their power to enforce the Bill of Rights."[20]

Judge Fake's analysis in *Jepson* accords with this Court's decision in *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946), and suggests the proper result here. That case, like *Jepson* involved an action under the Emergency Price Control Act. That Act provided *inter alia*, for criminal sanctions, injunctive relief and the stated penalty for treble the amount of any overcharge in violation of the Act. This Court held that a court granting relief under the civil penalty sections of the Act "acts as court of law rather than as a court of equity . . ." Here, OSHA is similar to the Emergency Price Control Act in that in under separate provisions it calls for injunctive relief,[21] criminal sanctions,[22] and civil penalties.[23] The civil penalty provisions here are "legal" and command that the right to jury trial be afforded.

20. *United States* v. *Jepson*, *supra*, at 984, 986. *Accord*, *United States* v. *Hart*, 86 F. Supp. 787 (E. D. Va. 1949); *United States* v. *Friedland*, 94 F. Supp. 721 (D. Conn. 1950). See, *United States* v. *Williams*, 498 F. 2d 414, 422-423 (2nd Cir. 1974) and authorities cited therein.

21. OSHA § 13, 29 U. S. C. § 662.

The foregoing requires the conclusion that had Congress provided for the enforcement of OSHA in district court, the right to jury trial would attach.[24] Since Congress has chosen an administrative tribunal rather than district court in which the legal actions arising under OSHA should be tried, may Congress nullify the Constitutional right of trial by jury by this "mere statutory enactment"? *United States* v. *Jepson*, *supra*. As we demonstrate below, Congress may not permissibly do so.

C. Congress' Selection of an Administrative Forum Here Does Not Destroy the Right to Jury Trial.

Primarily in reliance in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), the Third Circuit below concluded that the right to jury trial did not attach because OSHA is an administrative proceeding. In *Jones & Laughlin*, the Court ordered enforcement of an NLRB order requiring reinstatement and back pay to a discharged employee. The respondent argued there that the back pay order was analogous to an award of money damages at common law, thus entitling it to a jury trial under the seventh amendment. The Court rejected this contention, holding that where an award of money damages is only incidental to the equitable relief of reinstatement, no seventh amendment right attaches.

This holding is not at odds with the seventh amendment because a Labor Board proceeding is equitable; it merely seeks restitution of the *status quo ante;* specifically, it places employees in the exact position in which they would have been had no violation of their statutory rights occurred. Similarly, in *Porter* v. *Warner Holding Co.*, *supra*, while that portion of the Emer-

22. OSHA § 17(e), 29 U. S. C. § 666(e).

23. OSHA §§ 17(a-d), *supra*.

24. *Curtis* v. *Loether*, *supra*; *United States* v. *Williams*, *supra*.

gency Price Control Act which permitted injunctive relief, including restitution of overcharges, was deemed to be an equitable action, it was deemed so only in that regard. Since the government may seek restitution as an incident to injunctive relief in court, Congress may establish an administrative agency to adjudicate such matters without running contrary to the requirements of seventh amendment. An OSHA monetary exaction, however, is not incidental to an abatement order in the way that back pay is incidental to reinstatement. It does not seek to restore the *status quo ante*. It is payable to the Government and not to an employee injured as a result of a violation. Indeed, penalties may be exacted whether or not any employee is injured. OSHA monetary exactions are simply civil penalties. Therefore, a proceeding to enforce them is legal in nature and requires that the right to a jury trial be afforded.

Nothing in *Curtis* v. *Loether, supra,* suggests a contrary result. In *Curtis,* this Court had no difficulty in holding under traditional seventh amendment analysis, that the right to a jury trial attaches to a court proceeding to recover damages under Title VIII of the Civil Rights Act of 1968.[25] In response to the petitioner's contention that no right to jury trial accrued under that Act, this Court stated that *Jones & Laughlin* involved an administrative proceeding "where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme." 415 U. S. at 194. However, contrary the lower court's notion here that *Jones & Laughlin* stands for the broad proposition that regardless of the nature of the proceeding, the right to a jury trial will be denied simply because it will interfere with a statutory scheme. *Jones,* as noted was limited to an "equitable" proceeding.[26] That the mode which

25. 42 U. S. C. § 3612.

26. Justice Hughes, in relying on the fact that the NLRB created a statutory proceeding for the adjudication of unfair labor practices signified that this basis was limited to "equitable" actions or actions which did not carry a common law right to a jury trial:

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Congress selects for adjudication of legal actions is irrelevant under traditional seventh amendment analysis was established by Justice Story's language in *Parsons* v. *Bedford,* 28 U. S. (3 Pet.) *supra* at 447, considered to be the origin of the traditional test:

> "By *common law,* [the amendment's framers] meant . . . not merely suits which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights." (emphasis the Court's.)

The key elements of Justice Story's test are (1) that the right to jury trial is not limited to *proceedings* which existed at common law, and (2) that the right applies to actions where legal remedies are sought, *"whatever might be the peculiar form which they may assume . . ."* Thus, it is apparent that under traditional analysis the right to a jury trial would attach where, as here, legal rights are involved irrespective of Congress' creation of an administrative agency to adjudicate those rights.[27]

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> "The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown at the common law. It is a statutory proceeding Reinstatement of the employee and payment for time lost are requirements imposd for violation of the statute and are remedies appropriate to its enforcement." 301 U. S. at 48-49.

In any event, the *amicus* contends that even if the right to jury trial were here balanced against any alleged interference with this statutory scheme, the balance must be struck in favor of according employers their seventh amendment right. See, Part II of this brief.

27. In this regard, the Court's *arguendo* assumption, in *Pernell* v. *Southall Realty, supra,* that Congress could have entrusted landlord-tenant disputes in the District of Columbia to an administrative agency without acting contrary to the seventh amendment does not

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As Judge Gibbons in his dissent below stated, that if unbeknownst to legal scholarship, the majority below correctly interpreted *Jones & Laughlin,* then that case wrought "the most profound change and enormous redistribution of power among the three branches of the federal government of any case in the Court's history." In agreement with Judge Gibbons, the *amicus* has always thought that the arbiter of the lines drawn by the Constitution was this Court, not Congress; that in defense of one's legal rights, one is entitled to the guarantee of a jury trial rather than be thrown to the vagaries of the bureaucratic process; and that unless, contrary to the founding fathers,[28] we are willing to permit the nullification of our cherished rights by mere statutory enactment, the lower court's interpretation of *Jones & Laughlin* must be rejected, and the right to a jury trial under OSHA must be afforded.

Further, the fact that Congress has been permitted by legislation to deny the right to jury trials in certain areas does not suggest that that right should be denied here. Thus, in those cases wherein the authority of Congress to establish an administrative proceeding or otherwise deny the right of jury trial has been upheld, Congress was acting under powers expressly enumerated and exclusively ceded by the Constitution to Congressional control.[29] The rationale for this traditional deference has been stated by Justice White:

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require a different result. This *dicta,* followed by a citation to *Curtis, supra,* only reiterates the proposition that Congress does not act in contradiction to the seventh amendment by entrusting appropriate matters to administrative proceedings. The Court did not hold that Congress could deny the right to a jury trial where that right is guaranteed by the seventh amendment. Presumably, had the Court intended to overrule its preceding cases to the contrary, it would unquestionably have said so instead of reaffirming them.

28. See, fn. 14 of this brief and accompanying text.

29. *E.g., Passavant* v. *United States,* 148 U. S. 214; *Oceanic Stream Navigation Co.* v. *Stranahan,* 214 U. S. 320; *Elting* v. *North German Lloyd,* 287 U. S. 324; *Lloyd Sabaudo* v. *Elting,* 287

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> "In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it is within the competency of Congress, *when legislating as to matters exclusively within its control,* to impose appropriate obligations . . . without the necessity of invoking the judicial power." *Oceanic Stream Navigation Co.* v. *Stranahan,* 214 U. S. at 339. (Emphasis added.)

Here, however, that rationale requires rejection of the Government's claim that Congress may deny a jury trial in civil penalty proceedings under OSHA. Though OSHA was enacted in the exercise of the powers delegated to Congress under the Commerce Clause and the general welfare provision of article I,[30] occupational safety is not expressly delegated to Congress by the Constitution, nor is it a domain over which Congress has exclusive control. It is one thing for Congress to establish proceedings which do not afford a jury trial when legislating as to matters which have been created and ceded by article I of the Constitution to Congress' exclusive care and control or as to matters which do not have a common law analog that afforded the right to jury trial. As to such matters, Congress' will is entitled to deference. However, as to matters where, by analogy, the common law accorded the right to a jury trial prior to enactment of the Constitution, the seventh amendment preserves that right and Congress' nullification of that right is not entitled to deference.

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U. S. 329; *Allman* v. *United States,* 131 U. S. 31; *Katchen* v. *Landy,* 382 U. S. 323, involved areas of taxation, alien immigration, import customs assessment, bankruptcy and the post office. All these areas are specifically enumerated and exclusively ceded to Congress by article I, section 8 of the Constitution. *Helvering* v. *Michell,* 303 U. S. 391 (1938) concerned only the right to jury a claim under Article III, Section 2 of the Constitution. The seventh amendment contention was not raised as it is here.

30. OSHA § 2(b), 29 U. S. C. § 651(b).

II.

APPLICATION OF A LESS TRADITIONAL "BALANCING" APPROACH MANDATES THE RIGHT TO A TRIAL DE NOVO UNDER OSHA.

It has been asked whether as a result of the expansive reading given *Jones & Laughlin* by the Court in *Curtis* v. *Loether*, the Court might now be applying a "balancing" test to determine the applicability of the seventh amendment rather than the traditional test discussed above.[31] However, the Court's opinion in *Curtis* clearly rejected any such notion of balancing asserted countervailing policy considerations against the constitutional guarantee stating: "[T]hese considerations are insufficient to overcome the clear command of the seventh amendment." 415 U. S. at 198. The *amicus* subscribes to this view and, in agreement with Judge Gibbons below, does not believe that speedy attainment of social goals, as desirable as they might be, can justify compromising the higher purpose of preserving constitutional government. Nevertheless, the *amicus* submits that even if the Court were to balance the considerations which would result in the denial of a jury trial in administrative proceedings against the seventh amendment guarantee, that balance results in the preservation of the right to a jury trial under OSHA.

Foremost among those policy considerations generally urged is the contention that a jury trial would substantially interfere with the statutory scheme.[32] Second is the argument that permitting jury trials would cause delay in enforcement due to the overburdening of court dockets. And, third is the view held among some observers that the issues to be dealt with under

31. See Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 N. W. L. Rev. 486, 520-521 (1975).

32. *Curtis* v. *Loether*, *supra*; *Block* v. *Hirsh*, 256 U. S. 135 (1971).

allegedly complex administrative rules and regulations are beyond the capabilities of juries.[33]

The first two objections do not withstand analysis here because providing for an elective trial *de novo* after the administrative procedure is completed would not substantially interfere with the administrative scheme of the Act. It would only impair the finality of administrative adjudications and leave the great majority of the Agency's functions unaffected. Nor would it seriously delay enforcement of OSHA. Since the Act already provides for district court enforcement of penalties levied under the administrative process, further consideration of the merits of the underlying citations would not seriously impede enforcement.[34] Any delay caused by permitting a jury trial is an insignificant consideration when weighed against the "policy" of preserving the seventh amendment guarantee. *Pernell* v. *Southall Realty*, *supra*.

Finally, there is no basis to the argument that juries are incapable of resolving issues arising from administrative regulations. If a jury of lay persons is fully competent to resolve complex questions arising under the antitrust laws, federal securities or trade regulations,[35] then surely it is not beyond the ken of the citizenry to determine whether an employer has created or permitted a hazardous condition to exist in the work place. As this Court has stated in response to those who criticize the jury system and would favor its erosion:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amend-

33. See, Redish, *supra* at 502-514.

34. In this regard, it has been noted that a procedure like that advocated here is employed under the Federal Communications Act, 47 U. S. C. § 503-504, and has not impeded enforcement of that Act. See L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 113 (Student ed. 1965).

35. *Beacon Theatres* v. *Westover*, 359 U. S. 500 (1959); *Ross* v. *Bernhard*, 396 U. S. 531 (1970); *United States* v. *Williams*, *supra*.

> ment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the Courts". *Jacobs* v. *New York*, 315 U. S. 752.

As stated, while the *amicus* rejects the "balancing" approach to the seventh amendment question because in the final analysis that test results in leaving in Congress power, by legislation, to nullify the right to jury trial,[36] application of that test here, nonetheless, compels that the right be accorded under OSHA.

CONCLUSION.

For the foregoing reasons as well as those urged by Petitioners, it is respectfully submitted that the judgments of the lower courts be reversed and that the OSHA enforcement procedures be declared to violate the seventh amendment.

Respectfully submitted,

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36. See, Redish, *supra* at 531.

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